71-1617

Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

ROBERT A. SCHMITZ,

Petitioner,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. also known as INTERNATIONALE INDUSTRIE UND HANDELSBETEILIGUNGEN, A.G.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Robert A. Schmitz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 15, 1972, motion for reconsideration by the Court of Appeals denied by order entered March 15, 1972. Such judgment of the Court of Appeals affirmed the judgment of the United States District Court for the District of Columbia, entered on May 15, 1970, for the defendant, and the order of the United States District Court for the District of Columbia, entered on July 1, 1970, which denied plaintiff's motion for reconsideration or, alternatively, to open the judgment and take additional testimony.[1]

[1] Although the notice of appeal to the Court of Appeals expressly included both appeal from the judgment of May 15, 1970 and the order of July 1, 1970 denying the later motion for reconsideration or to open the judgment and take additional testimony, the judgment of affirmance of the Court of Appeals refers only to the *judgment* of the District Court and makes no mention of the *order* of denial of the later motion.

Opinions

No opinion was delivered by the Court of Appeals in affirming the judgment of the District Court or in denying the motion for reconsideration.

District Judge McGarraghy of the United States District Court for the District of Columbia, in finding for the defendant after trial without a jury, delivered an opinion, which has not been reported. A copy of such opinion is appended.

No opinion was delivered by the District Judge when he denied the motion for a reconsideration or, alternatively, to open the judgment and take additional testimony.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 15, 1972, motion for reconsideration denied by order entered on March 15, 1972, affirmed a final judgment of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254(1).

Question Presented for Review

Whether the United States District Court in a suit tried without a jury, after having found that petitioner (plaintiff) was entitled to recover from respondent (defendant) reasonable compensation for services rendered by him to respondent and then having given judgment for respondent on the basis that there was no evidence as to the reasonable value of petitioner's services, properly denied petitioner's motion for reconsideration or, alternatively, to open the judgment and take additional testimony.

Constitutional Provisions and Statutes Involved

Amendment V of the United States Constitution, in part, provides:

> "No person . . . shall be deprived of . . . property, without due process of law; . . ."

Rule 59(a), Federal Rules of Civil Procedure.

> Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Statement of the Case

Petitioner brought the instant suit[1] in the United States District Court for the District of Columbia against respondent, commonly known as Interhandel, a corporation of the

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[1] Petitioner had first instituted a suit in the United States District Court for the District of Columbia, Civil Suit No. 1900-65, against the respondent herein and joining as a defendant Henry H. Fowler, Secretary of the Treasury. The complaint was dismissed on the grounds of sovereign immunity of the United States, 249 F. Supp. 757, affirmed U.S. Court of Appeals for the District of Columbia Circuit, certiorari denied, 387 U.S. 908. Thereafter the instant suit was brought against respondent alone.

Conferation of Switzerland, claiming an equitable lien upon a fund of approximately $121,000,000 which had been deposited in the Treasury of the United States for the credit of, and in the name of, respondent under settlement of Civil Action No. 4360-48 in the United States District Court for the District of Columbia by the respondent against the Attorney General of the United States as successor to the Alien Property Custodian. Petitioner claimed an equitable lien upon the fund for services performed by him in the employ of respondent as its agent in the creation and preservation of the fund.

The District Court for the District of Columbia had jurisdiction of this case by reason of the provisions of Section 11-521 of the District of Columbia Code (1961 ed. Supp. V), the general equity powers *in rem* over a fund within the District of Columbia, and personal jurisdiction over John J. Wilson, the agent of defendant, such personal jurisdiction having been established under the ruling in *Kelberine* v. *Societe Internationale etc.*, 124 U.S. App. D.C. 257, 261-262, 363 F. 2d 989, 993-994, certiorari denied 385 U. S. 989 (No. 539).

The fund was derived from the sale to the public of 11,166,488 shares of General Aniline and Film Corporation, an American corporation, known as GAF, being approximately 90% of the outstanding stock of GAF and representing the stock of that company that was originally owned and controlled by respondent from its incorporation until 1942. On February 16, 1942 the Secretary of the Treasury of the United States had issued a Vesting Order under the Trading with the Enemy Act, seizing these shares as the property of an allegedly enemy-owned corporation. The United States Government had steadfastly refused during and after the war to return this stock to respondent. Although suit had been brought against the United States in 1948 by the respondent for the return of the vested GAF shares (*Societe Internationale etc.* v. *Clark,* Civil

Action, U.S. District Court for the District of Columbia, No. 4360-48; intervention allowed, *Kaufman* v. *Societe Internationale etc.*, 343 U.S. 156; see also, *Societe Internationale etc.* v. *McGrath*, 86 U.S. App. D. C. 157, 180 F 2d 406 and *Societe Internationale etc.* v. *Brownell*, 96 U.S. App. D. C. 232, 225 F 2d 532, certiorari denied 350 U.S. 937), the Government had resisted the action strenuously. Even after the decision of this court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, the time when the dispute would be resolved remained far in the future and the mode and substance of the ultimate resolution of the controversy continued to be in doubt.

The complaint in the within suit is for compensation for services rendered by petitioner to respondent from 1958 to 1960 in procuring Mr. Charles E. Wilson to represent respondent as attorney-in-fact and trustee under an irrevocable power of attorney with broad powers to negotiate with the United States government and settle the dispute concerning GAF and respondent's interest therein. Recovery was sought on an alleged express oral contract whereby petitioner would be paid five per cent of any monies which respondent received in settlement of its dispute with the United States government, or for equitable relief through the imposition of an equitable lien on the fund in the sum of $121,000,000 which respondent ultimately received for its GAF stock.

The case came on for trial before District Judge Joseph C. McGarraghy, the parties having waived a jury, who handed down a written decision directing judgment for defendant. The opinion, constituting the court's findings of fact and conclusions of law, is appended to this petition.

The basic facts in the case, as found by the court, are stated in the opinion of Judge McGarraghy, particularly in the portions of the opinion which are headed "Historical Background" and "Background of Plaintiff". These facts may be summarized and restated as follows, in the

form of the allegations of the complaint as admitted by respondent in its answer or by stipulation, or as found by the court in its opinion, or, while not expressly admitted by respondent or stated as findings in the court's opinion, as proven on the trial and not controverted by any testimony or other proof.

For many years the petitioner had been intimately acquainted with the affairs of GAF and its relationship to respondent. His father, Dietrich A. Schmitz, now deceased, was president and chairman of the board of directors of GAF from its inception in 1939 until its vesting by the United States government in 1942. Dietrich A. Schmitz also had served as the principal officer of GAF's predecessor corporation, which also was owned by respondent. Over the years petitioner acquired an intimate knowledge of the complicated relationship between respondent and its owners and managers, and he also earned the friendship and trust of the said owners and managers, particularly of Dr. Hans Sturzenegger, the principal stockholder. The officers of respondent had come to rely on plaintiff's knowledge of the intricacies and vagaries of American policies and of the personalities of key American officials, especially as they related to the varying hopes and fears of the Swiss owners of GAF and the prospects of salvaging their enormous investment in respondent's United States subsidiary, General Analine and Film Corporation.

A number of American corporations sought to buy respondent's interest in GAF not only because it was a valuable property, but also because they judged that an American corporation would be in a better position than a foreign corporation to obtain the return of the seized stock. Respondent gave serious consideration to various proposals. From 1947 through 1958, petitioner was, with the consent and encouragement of the respondent, successively authorized to act, and did act, on behalf of Reming-

ton Rand, Inc., Atlas Corporation, Shields and Co., W. R. Grace and Co., and Food Machinery and Chemical Corporation, and, in anticipation of the receipt of substantial fees and commissions, expended a great deal of time, money and effort to bring about such a purchase.

In December 1958, while petitioner was in Switzerland carrying on negotiations between Food Machinery and Chemical Corporation and respondent, he was told by the aforementioned Dr. Hans Sturzenegger that respondent had finally determined not to sell its interest in GAF until it had brought to a conclusion its claim against the United States government. Because the civil action brought by respondent in the District Court for the District of Columbia, hereinabove referred to, seemed endless and because it felt that the handling of its claim had blackened its image and prejudiced its interests, respondent decided that it would itself negotiate with the United States government for the return of its GAF stock or for compensation, through an agent of its own choosing. Such agent would have to be of the highest standing and reputation. Petitioner's cooperation in effecting these arrangements was solicited by respondent.

Petitioner suggested the name of Charles E. Wilson, formerly president of the General Electric Company, as a possible agent to conduct these negotiations. He had been a high government official, executive vice-chairman of the War Production Board in World War II and Defense Mobilizer during the Korean conflict, and was then serving as president of the People to People Foundation, to which position he had been appointed by President Eisenhower. Petitioner was personally acquainted with Mr. Wilson and suggested his name as respondent's representative because Mr. Wilson enjoyed the confidence and respect of prominent United States officials and could therefore negotiate at the highest levels of government. After several conferences with Mr. Wilson, petitioner reported to respondent that

Mr. Wilson could be persuaded to act only if he were offered full powers as trustee to negotiate a settlement of the dispute upon such terms and conditions as would appear honorable and just to him. It was urged that the trusteeship would afford respondent complete protection and full accounting of the trustee's transactions and such powers would be terminable only upon the achievement of the objective. Petitioner's suggestion was accepted and he was asked to bring about the trusteeship of Mr. Wilson.

During these same meetings with Dr. Sturzenegger and other agents of respondent in December 1958, petitioner pointed out that adoption of this new approach would disable him from earning the fees and commissions on the sale of respondent's interest for which he had worked so hard for so many years; that bringing about the Wilson trusteeship would be of great value and importance to respondent, and that it would take much time, travel and effort to give Mr. Wilson the necessary background to persuade him that respondent's cause was just, and to induce him to undertake the trusteeship.

Petitioner then proceeded with his efforts to bring about the trusteeship of Mr. Wilson. From the end of November 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers—a period of 18 months—petitioner devoted almost all of his time, attention and his own money resources, as well as much travel, to bring about the desired result. This entailed three trips to Switzerland by petitioner to confer with officials of respondent and respondent sent its representatives to New York three times to confer with petitioner and Mr. Wilson. In confirmation that petitioner was acting for respondent as its authorized agent in these negotiations, respondent, in May of 1960, reimbursed petitioner $13,733 for out-of-pocket expenses previously incurred. Petitioner's task was difficult. Among other things, it was necessary for petitioner to accomplish the following: (a) to provide the essential background to

persuade Mr. Wilson of the merits of respondent's position in the dispute; (b) to convince him of the good faith and integrity of respondent's management; (c) to induce him to accept the feasibility of the trust approach; (d) to prevail upon him to commit his time, energy and reputation to the effort; (e) to bring him together with respondent's owners, managers and agents, in meetings in New York and Paris; (f) to maintain both confidence and contact between respondent and Mr. Wilson during the transfer in respondent's stock ownership and management; (g) to give body and substance to the trust idea; and (h) to draft a resolution of the executive committee of respondent's board of directors, an option contract, and a power of attorney acceptable in form and substance to both Mr. Wilson and respondent. Petitioner subsequently accomplished all these tasks.

Mr. Wilson agreed to serve as trustee and exercise his powers as such, because he was convinced that the respondent's cause was just and regarded the confiscation of GAF as contrary to the interests of the United States, illegal, immoral and unwise. It was through the efforts of petitioner that Mr. Wilson was so convinced. Mr. Wilson stated that he desired to receive no compensation for his services. On May 23, 1960, Mr. Wilson accepted the trust powers and petitioner promptly communicated to respondent by transatlantic telephone the news of the acceptance.

Upon the release of the news of the appointment of Mr. Wilson as trustee and attorney-in-fact for respondent, the price of respondent's stock on the Zurich Bourse jumped over 2,000 Swiss francs per share, or approximately 450 American dollars per share, so that with 110,000 shares of respondent's stock outstanding the value of Mr. Wilson's acceptance of the trusteeship, as appraised in the stock market, was approximately $55,000,000, and the ultimate amount received by respondent for its GAF stock was almost precisely the same as the price of the stock after Mr. Wilson's acceptance of the powers.

Following Mr. Wilson's acceptance of the trust powers and with respondent's continuous active cooperation, Mr. Wilson and his attorney, Mr. Charles M. Spofford, began the task of convincing the United States government, and specifically the Department of Justice, that this long, seemingly interminable, case should be settled out of court. Intensive negotiations were entered into with the highest officials of the United States government in an effort to convince them of the merits of respondent's claim and injustice of the government's resistance thereto.

The November, 1960, presidential election caused an inevitable break in the negotiations since insufficient time remained for the conclusion of any settlement with the outgoing Republican administration and serious negotiations could not be resumed until the new Democratic administration, specifically the new Justice Department, had familiarized itself with the case. Mr. Spofford, with the assistance of petitioner, prepared a detailed lengthy memorandum or brief, recounting the various steps that had taken place since the original vesting order and detailing the arguments in support of the return of the vested GAF stock to the respondent and settlement of the controversy and this memorandum was of invaluable assistance in acquainting the members of the new administration with the background of the entire affair and the reasons calling for an agreed disposition of the dispute.

In the latter part of 1961, while negotiations were proceeding with the government, despite the promise as expressed in the trust instrument or power of attorney that respondent would not deal in any way with the United States government concerning the claim except through the trustee, Dr. Albert Schaefer, then chairman of the board of respondent and acting on its behalf, secretly and without the knowledge of Mr. Wilson, entered into direct negotiations with the United States government concerning the settlement of its claim. This made the trustee's posi-

tion untenable. Besides being a violation of the exclusive irrevocable power of attorney, this action undercut the authority of the trustee, and Mr. Wilson thereupon undertook to withdraw from proceeding further in behalf of respondent.

A settlement was eventually made whereby the vested GAF stock would be sold to the general public with the net proceeds then divided 50% to the government and 50% to respondent, with various expenses and taxes to be paid from the respondent's share. The fund of approximately $121,000,000 which was eventually deposited in the United States Treasury for the account of the respondent, represented the net proceeds to the respondent.

The trial of the case, which was held before District Judge McGarraghy, without a jury, began January 5, 1970 with testimony concluded, after occasional interruptions and adjournments, on February 4, 1970. The transcript of the testimony and depositions comprises over 1,300 pages with an additional more than 600 pages of exhibits. The decision of the trial court is dated May 7, 1970.

Petitioner then moved for reconsideration, or, alternatively, to open the judgment and take additional testimony. The motion included the following:

> "7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him.
>
> "Wherefore, the premises considered, plaintiff moves this Court to reconsider the decision heretofore reached in the instant case, or, alternatively, to open the judgment and take additional testimony."

This motion was argued and submitted on June 25, 1970. Submitted to the court at the time of argument was an affidavit by Charles E. Wilson reading as follows:

"AFFIDAVIT OF CHARLES E. WILSON.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

Personally appeared CHARLES E. WILSON, of 7 Hampton Road, Town of Scarsdale, Westchester County, New York, before me, who, being first duly sworn, deposes and says that:

On May 23, 1960, I accepted all of the duties and imperative mandates to act as sole Trustee under Powers in Trust for Societe Internationale Pour Participations Industrielles et Commerciales, S.A., also known as Interhandel. I became Trustee under the Resolutions and Powers conferred upon me by the above Interhandel, made part of one another, as ratified on April 28, 1960, at the office of Union Bank of Switzerland, Zurich, Switzerland, and which I accepted and acted upon, and which Resolutions coupled to my Powers expressed the intentions of the parties.

Thereunder, I was required by Interhandel to settle their action against the Attorney General of the United States, and solely to conclude any and all negotiations related to all of the property and business of Interhandel in the United States of America the subject matter of this action, and to convey their property to American purchasers with clear title.

I was required to discharge all claims and all liens outstanding, and that would include the equitable lien of Robert A. Schmitz of which I had knowledge. With that knowledge, and in order to carry out my mandate also con-

sistent with the added express oral understandings arrived at with Interhandel at Paris, France, on April 30, 1960, the fixation of fees including the fee of Mr. Robert A. Schmitz was in my sole discretion under my Powers in Trust. Ever since that point in time it has been and remains my firm judgment that the reasonable value of the said services of Mr. Robert A. Schmitz was not less than five percent (5%) of the sums recovered by Interhandel under the settlement, and I would have paid Mr. Schmitz not less than five percent out of the sums recovered as part of my obligation. Paragraphs 23 and 24 of the Resolutions part of my Powers are expressive of the intentions of Interhandel for me to effectively execute, and Paragraphs 2, 4, 5, and 6 of my specific Powers in Trust confirm my obligation.

CHARLES E. WILSON

Sworn to May 26, 1970''

The motion for reconsideration or to open the judgment was denied, without opinion, on June 30, 1970.

The appeal to the United States Court of Appeals for the District of Columbia Circuit was from both the judgment in favor of defendant (respondent) against the plaintiff (petitioner), entered on May 15, 1970, and also from the order denying the motion for reconsideration, or, alternatively, to open the judgment and take additional testimony.

The appeal was heard before a panel consisting of Circuit Judges Wright, Tamm and MacKinnon and the judgment of the District Court was unanimously affirmed without opinion except that the court stated that it was in agreement with the findings of fact and conclusions of law filed by the District Court. The judgment of affirmance makes no reference to the order of the District Court which denied the motion for reconsideration or, alternatively, to open the judgment and take additional testimony.

Reasons for Granting the Writ

I.

Petitioner's motion for reconsideration, or alternatively, to open the judgment and take additional testimony, should have been granted.

A. The Decision of the Trial Court, Affirmed by the Court of Appeals, that the Petitioner is Entitled to Relief under either Implied Contract or Quasi-Contract and in Either Case He had Shown that He is Entitled to Reasonable Compensation for his Services, but Nevertheless Judgment Should be Entered for Defendant, is Inconsistent and Erroneous.

The trial court, as a matter of fact and conclusion of law, stated that on the basis of either implied contract with respondent or quasi-contract to prevent unjust enrichment of respondent, petitioner had "shown that he is entitled to reasonable compensation for his services." Despite that find and ruling, the trial court then proceeded to deny petitioner any compensation and awarded judgment to defendant.

This extraordinary result was reached, even though the record contains many indicia of the worth of the petitioner's unique and valuable services, such as the general earning power of petitioner and the worth of his services as indicated by agreements with various other companies, the sharp rise in the value of respondent's own stock on the announcement that Mr. Wilson had accepted the trusteeship, and the fact that respondent had agreed that the trustee could expend from $20,000,000 to $30,000,000 of the ultimate recovery for the payment of claims against respondent, including petitioner's claim. The primary reason, however, for the District Court's bizarre ruling, that although petitioner was entitled to reasonable compensation for his services no compensation would be allowed to him, was that the District Court, in seeking

certainty and specificity with respect to proof as to the value of his services, misconstrued the federal rule as to damages.

In *Hetzel* v. *Baltimore & Ohio Railroad Company,* 169 U.S. 26, the court said, at page 37:

> "Of course, in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages."

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, the court, at page 379, quoted the lower court in the case which had said, "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate" and then said, "This, we think, was a correct statement of the applicable rules of law."

In *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 220, the court said, at page 265, "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565; and see also Palmer v. Connecticut Railway Co., 311 U.S. 544, 559, and cases cited."

The same principles have been laid down and followed by U.S. Courts of Appeals. In *General Finance Corp.* v. *Dillon,* 172 F 2d 924, the Court of Appeals for the Tenth Circuit said, at page 930:

> "But when a breach of contractual obligation with resulting damage has once been established, the mere

uncertainty as to the exact amount of damages will not preclude the right to a recovery. In such cases it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result may be only approximate."

In *Specialty Assembling & Packing Co.* v. *United States*, 355 F 2d 554, at page 572, the Court of Claims said:

"However, this inability to determine the precise amount of the damages attributable to the Government's breach of contract does not preclude the court from entering a judgment for the plaintiff. The ascertainment of damages is not an exact science. Western Contracting Corp. v. United States, 144 Ct. Cl. 318, 320 (1958). Hence it is not essential that the amount of damages be ascertainable with absolute exactness or mathematical precision. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379; Brand Investment Co. v. United States, 58 F Supp. 749, cert. denied, 324 U.S. 850. It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation. Hedrick v. Perry, 102 F. 2d 842, 807. In estimating damages, the Court of Claims occupies the position of a jury under like circumstances; and all that the litigants have any right to expect is the exercise of the court's best judgment upon the basis of the evidence provided by the parties. United States v. Smith, 94 U.S. 214, 219."

B. The Petitioner Should Have Been Allowed to Submit Additional Proof as to the Amount of Damages.

Rule 59(a) of the Federal Rules of Civil Procedure provides that on a motion for a new trial in an action tried without a jury, the court may change the judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Petitioner was entitled to this relief and it was an abuse of discretion to deny his motion for reconsideration or, alternatively, to open the judgment and take additional testimony. The inconsistent decision of the trial court, referred to above, caught petitioner by surprise. He fully expected that the trial court would find that there was an express contract whereby he was to receive 5% of the amount of the recovery of respondent in the settlement of its suit against the United States. Manifest injustice will result if petitioner is now barred from any recovery for the valuable services he rendered to respondent on the technical basis of failure of proof of the value of those services.

The case had been tried without a jury and had been adjourned from time to time during the course of the trial, so that there was no overwhelming need, or any need at all, to proceed with the immediate and final disposition of the case.

In the interests of justice, the petitioner's motion should have been granted and in the interests of justice the matter should be remanded to the District Court to allow petitioner to present further proof as to the value of the services which the trial court has already found that he rendered.

This is no ordinary case. It involves one of the most complicated combinations of litigation and industrial and financial complexities in history—the GAF takeover, the long and involved contest for its reacquisition, the disposition of the Swiss owned stock among the members of the American public, and the division of the proceeds between the government, the owners of the vested stock and other claimants. Petitioner was in the mainstream of this entire affair for years. To quote from the opinion of the trial court, "No one contends that plaintiff (petitioner) was not well versed in all phases of the Interhandel controversy" and, when Mr. Charles E. Wilson, who had been

considering accepting the trusteeship suggested by petitioner, insisted upon being convinced of the validity of the Swiss claim, "This plaintiff (petitioner) attempted to do. Plaintiff (petitioner) gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved."

Just as this court granted certiorari in such cases as *International Terminal Operating Co.* v. *N. V. Nedrl. Amerik,* 393 U.S. 74, in an ordinary civil case between a shipowner and a stevedoring company, because this court felt that an issue of fact should have been left to a jury's determination, and also granted certiorari and remanded for further proceedings in the district court in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens,* 394 U.S. 700, because of disagreement as to factual questions as passed on by the district court, certiorari should be granted in the instant case for the reasons hereinabove expressed and in the interests of justice.

CONCLUSION

This case presents an important issue with respect to the exercise of discretion by the District Court in denying an application to reopen a judgment for the submission of additional proof and where justice will be denied unless petitioner is afforded an opportunity to submit further proof as to the value of services rendered which the trial court has already found that he rendered.

Respectfully submitted,

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Harwood Building
Scarsdale, New York 10583

June, 1972.

APPENDIX

Opinion

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-67

ROBERT A. SCHMITZ

Plaintiff

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A.

Defendant

MR. ROSS O'DONOGHUE, MR. GEORGE A. FISHER, O'Donoghue & O'Donoghue, for Plaintiff

MR. JOHN J. WILSON, MR. FRANK H. STRICKLER, Whiteford, Hart, Carmody & Wilson, for Defendant

Plaintiff, Robert A. Schmitz, seeks compensation for services rendered defendant corporation, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. (hereinafter Interhandel).

Plaintiff's complaint and pre-trial statement listed two counts. The first was for services rendered as a "finder" who procured Mr. Charles E. Wilson to act as agent for Interhandel. The second was for services rendered to Interhandel after Mr. Wilson consented to represent Interhandel.

At trial, plaintiff announced that he would proceed only with Count 1, that is, for compensation for procuring the services of Mr. Wilson. Only this is before the court.

Opinion.

The case was tried by the court, the parties having waived jury trial.

Preliminarily, the court finds the following:

A. This suit is not barred by the Statute of Limitations.[1] The fund out of which plaintiff claims he was to be paid became available in April, 1965. Suit was timely commenced January 10, 1967.

B. Under the ruling in *Kelberine* v. *Societe Internationale, Etc.*, 124 U.S. App. D.C. 257, 261-262, 363 F.2d 989, 993-994 (1966), *cert. den.* 385 U.S. 989, this court has jurisdiction of the defendant corporation by virtue of service of process on its agent, Mr. John J. Wilson.

Plaintiff seeks recovery on an alleged express oral contract or for equitable relief through the imposition of an equitable lien on a fund in the sum of $121,000,000.00.

The case was tried in such a manner that relief would be proper[2] under any of three theories:

1. Express contract;
2. Implied contract to pay a reasonable compensation; or
3. Relief in quasi-contract to prevent unjust enrichment of the defendant.

HISTORICAL BACKGROUND

The controversy which is the basis of this suit has been before the District of Columbia courts many times since 1948. While it is unnecessary to retell all its colorful history, some background must be provided to properly consider plaintiff's claim for compensation.

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[1] 12 D.C.Code, Sec. 301 (1967 ed.).

[2] Cf. Fed.R.Civ.P. 15(b).

In 1941, just prior to America's entry into World War II, Interhandel, a Swiss corporation, owned 90% of the stock of the American corporation, General Aniline & Film Corporation (hereinafter GAF).

On February 16, 1942, under the authority of the Trading with the Enemy Act of 1917,[3] the Secretaary of the Treasury seized all of Interhandel's GAF holdings on the theory that Interhandel was in fact a front for I.G. Farbenindustrie, A.G., a German corporation, and, therefore, the GAF stock was really enemy controlled.

After the war, there were several fruitless diplomatic attempts by Interhandel to regain its holdings in GAF.

Then, in 1948, Interhandel brought suit[4] in this court under section 9(a) of the Trading with the Enemy Act, seeking return of the vested GAF shares. From the start, the litigation was ensnarled in myriad procedural difficulties. The case traveled up and down the judicial ladder of appeal.[5]

Finally, in 1958, ten years after the suit was filed, the United States Supreme Court[6] cleared up the procedural problems, reinstated the cause of action, and finally gave Interhandel an opportunity to be heard on the merits.

And yet, even then, because of the extreme complexity of the case, and because over 300,000 documents, which had been produced by defendant via discovery proceed-

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[3] 50 U.S.C. Appx. 5(b).

[4] Civil Action No. 4360-48.

[5] 86 U.S. App. D.C. 157, 180 F.2d 406 (1950).
88 U.S. App. D.C. 296, 188 F.2d 1017 (1951), *rev.* 343 U.S. 156 (1952).
96 U.S. App. D.C. 232, 225 F.2d 532 (1955), *cert. den.* 350 U.S. 937 (1956).
100 U.S. App. D.C. 148, 243 F.2d 254 (1957), *rev.* 357 U.S. 197 (1958).

[6] *Societe Internationale Etc.* v. *Rogers* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255.

ings, had yet to be examined, the case was by no means ready for trial.

Dr. Hans Sturzenegger, a close friend of the plaintiff, was in control of Interhandel until 1958, when he resigned his directorship and relinquished his control to three leading Swiss banks—Union Bank, Credit Suisse, and Swiss Bank Corporation. In June, 1959, Dr. Sturzenegger sold most of his stock to Union Bank.

By reason of its acquisition of this stock, Union Bank assumed a prominent role in the management of Interhandel. The Chief General Manager of Union Bank, Dr. Alfred Schaefer, became head of Interhandel.

Prior to 1958, there had been attempts by various American corporations—such as W. R. Grace Co., Bell & Howell, Foof Machinery and Chemical Corporation—to acquire ownership of GAF.

In 1958, the idea of settling the Interhandel controversy by negotiation directly with the United States Government became both more desirable and more feasible.

Although the details were by no means clear, Dr. Sturzenegger, his attorney, Dr. Hugo Frey, and the plaintiff considered obtaining the services of some highly reputed American to act as an intermediary between the Swiss principals and the United States Government. The name of Mr. Charles E. Wilson was suggested by the plaintiff.

Mr. Charles E. Wilson had had a long and distinguished career in both government and business in the United States.

He was formerly the President of General Electric Corporation, Chairman of the Board of W. R. Grace Co., and a member of the Board of Directors of Morgan Guaranty and Trust Company in New York. He had previously served under President Franklin D. Roosevelt as Executive Vice-chairman of the War Production Board, and under President Truman as the Defense Mobilizer during

the Korean War. In 1958-59, he was serving as the Chairman of the People to People Foundation.

Plaintiff's activities concerning the acquisition of the services of Mr. Wilson will be examined in detail later. For now, suffice it to say that the possibility of Mr. Wilson's serving as an intermediator or "trustee" for the Swiss was broached to him by the plaintiff in 1958 and early 1959.

There was a short hiatus in the dealings with Mr. Wilson when Dr. Sturzenegger divested himself of control of Interhandel. However, activities were renewed with the new head of Interhandel, Dr. Alfred Schaefer, in October, 1959.

Plaintiff claims that on October 26, 1959, Dr. Schaefer, as head of Interhandel, expressly offered plaintiff 5% of any amount recovered by Interhandel from a settlement with the United States Government on condition that plaintiff procure the services of Mr. Charles E. Wilson to act as Interhandel's "trustee" or agent in dealing with the United States Government. It is on this alleged promise that plaintiff bases this lawsuit.

On April 29, 1960, Mr. Charles E. Wilson, his attorney, Mr. Charles Spofford of New York, Dr. Alfred Schaefer, his attorney, Dr. Wehrli, and the plaintiff met to consider Mr. Wilson's willingness to act on behalf of the Swiss.

The Swiss proposed to name Mr. Wilson as their sole and exclusive agent (called a trustee) in dealing with the United States Government concerning the GAF shares. Mr. Wilson was to have an unlimited, irrevocable power of attorney concerning Interhandel's interest in GAF.

On May 23, 1960, Mr. Wilson agreed to accept these broad powers.

Mr. Wilson and his attorney, Mr. Spofford, began the task of convincing the United States Government—spe-

cifically the Department of Justice—that this long, seemingly interminable, case should be settled out of court.

The evidence is not clear as to the extent of the negotiations between Mr. Wilson and Mr. Spofford on the one hand, and the Department of Justice on the other, although it is clear that contact was made with the Department and possible settlement arrangements were discussed, but without finality.

The November 1960 Presidential election had a crucial effect on negotiations. It became clear to Mr. Wilson that further negotiation with the outgoing Republican Administration would prove fruitless. Serious negotiations could not resume until the new Democratic Administration—specifically the new Justice Department—had familiarized itself with the case.

Discussions with the Department of Justice were resumed during the summer of 1961 but without any agreement being reached.

It was during the summer of 1961 that Dr. Schaefer and the other Swiss principals became exceedingly restless. The trustee had not delivered the expected early end to the dispute. The change of administration seemed, to Dr. Schaefer anyway, to have greatly reduced the effectiveness of Mr. Wilson.

Therefore, Dr. Schaefer attempted to deal directly with the new Attorney General, Mr. Robert F. Kennedy. After several vain attempts, a meeting between Mr. Kennedy and Dr. Schaefer was held in late October, 1961.

Although it was understood that it would take several years to work out the details, Mr. Kennedy and Dr. Schaefer basically agreed that a settlement on a 50-50 basis was most feasible.

After Dr. Schaefer's direct negotiations with Mr. Kennedy, Mr. Wilson expressed a willingness to withdraw completely as trustee. From the October, 1961 meeting between

Mr. Kennedy and Dr. Schaefer, Mr. Wilson ceased to participate in any negotiations concerning Interhandel. In March, 1963, he formally terminated his trusteeship.

On December 20, 1963, a Stipulation of Settlement was signed by Attorney General Kennedy and Mr. John J. Wilson, the attorney of record in the original civil action.

After protracted proceedings in this court concerning the settlement and the status of various intervenors, a sale of the GAF shares was effectuated by the Attorney General in April, 1965. Interhandel's net share of the proceeds was $121,000,000.00. It is from this recovery that plaintiff seeks compensation.

Plaintiff contends that, except for the intervention of Dr. Schaefer, Mr. Charles E. Wilson would have been able to negotiate a disposition of the matter at least as favorable, and possibly more favorable to Interhandel, than that which was the result of the intervention of Dr. Schaefer with the Attorney General.

This obviously is pure speculation. No agreement had been reached during the period when Mr. Charles E. Wilson and his attorney, Mr. Spofford, were actively engaged and the record is devoid of any evidence from which a determination can be made of the part which their efforts contributed to the ultimate result which was accomplished.

Of course, there is no claim by Mr. Wilson for compensation for his services, he having expressly stipulated that he would not accept any fee. As explicitly provided in the original agreement naming Mr. Wilson as Interhandel's agent, Mr. Spofford, as Mr. Wilson's attorney, was paid in full the amount of his fee which was not questioned by Interhandel.

Background of the Plaintiff

Plaintiff was well informed concerning the history of Interhandel. His father, Dietrich A. Schmitz, served as

President of American I.G. Chemical Corporation, which was merged with Ansco Corporation in 1939 to form GAF. Dietrich A. Schmitz served as President of GAF until the 1942 vesting order.

Plaintiff was the nephew of Hermann Schmitz who had formed I.G. Chemical Corporation—the predecessor of Interhandel. Plaintiff was also the nephew of Dr. Albert Gadow who, at one time, was the General Manager of Interhandel. Also, plaintiff had a very close friendship with Dr. Hans Sturzenegger who had virtual control of Interhandel from 1940 to 1958.

No one contends that plaintiff was not well versed in all phases of the Interhandel controversy.

Because of his expertise, plaintiff had been employed by several American corporations relative to the possible purchase of GAF stock. In the early 1950s, plaintiff was employed by Remington Rand as their representative in seeking acquisition of GAF. Thereafter, plaintiff was employed by W. R. Grace Co. from August, 1953, through May, 1956, as a consultant in connection with its efforts to acquire GAF.

In 1958, plaintiff (as an emissary of Food Machinery & Chemical Corporation) approached Dr. Sturzenegger concerning a sale of GAF. Other corporations, including Shields & Co., National Lead Company, and General Dynamics Corporation, also made overtures to plaintiff concerning employment related to Interhandel and GAF.

Express Contract

In this suit plaintiff places most of his emphasis on the theory of express contract.

As heretofore stated, plaintiff claims that, on October 26, 1959, Dr. Schaefer, the chief Director of Interhandel, orally promised him 5% of the value of any proceeds In-

terhandel might obtain in a settlement with the United States Government on condition that the plaintiff procure the services of Mr. Charles E. Wilson as trustee for Interhandel. Plaintiff claims he had a vested right to the 5% commission at the moment Charles E. Wilson accepted the trusteeship in May, 1960, regardless of the means by which a settlement was accomplished, but that actual payment would of necessity be delayed until the settlement fund actually became available.

Only the plaintiff and Dr. Schaefer were present when the alleged oral promise was made. Plaintiff insists that there was such an agreement; Dr. Schaefer is equally adamant in opposition. In this posture, the court must look for evidence which corroborates either the plaintiff or Dr. Schaefer.

After hearing fourteen days of testimony during which several hundred documents were introduced in evidence, and after having the benefit of thorough oral argument, the court is of the opinion that the plaintiff has failed to prove by a preponderance of the evidence that there was an express oral contract for a 5% commission or any commission for procuring the services of Mr. Charles E. Wilson.

1. The alleged contract was not in writing. The court realizes that it was not necessary that such a contract be in writing. Yet, careful business men (in which group both the plaintiff and Dr. Schaefer belong) invariably memorialize their agreements in writing. This would be the case especially when millions of dollars were at stake. Lack of a writing, in this situation, raises a serious question as to the existence of such an agreement.

2. Plaintiff contends that the extreme secrecy surrounding te entire Interhandel affair precluded any writing. This is highly questionable. In spite of the alleged secrecy,

there was prolific correspondence between the plaintiff and Dr. Schaefer on many topics. A simple writing between the parties would not have destroyed the needed secrecy.

Surely, after Mr. Wilson's acceptance of the trusteeship became public, in May, 1960, there was no need for secrecy.

Also, it is noteworthy that all of plaintiff's agency agreements with American corporations from 1950 to 1958 had been in writing.

3. It was not until January 17, 1962 (almost 20 months after Mr. Wilson's acceptance of the trusteeship, and more than 26 months after the alleged promise was made, and well after Mr. Wilson's activities had ended), that the plaintiff, in writing, alluded specifically to the alleged 5% agreement.

For one to wait so long, after what is alleged to have been a very specific promise, before specifically referring to that promise, seems unusual.

4. Plaintiff was compensated, at $2,000.00 per month, for services rendered Interhandel *after* Mr. Wilson accepted the trusteeship. This compensation continued from June 1, 1960 through December 31, 1961. In some of the plaintiff's correspondence with Dr. Schaefer concerning this compensation, he made vague, general statements about his "capital interest" in the eventual settlement. Such vague statements are not those of a man who has received a firm promise of a 5% commission.

5. The testimony conclusively showed that no one else had ever heard of the 5% agreement until plaintiff's January 17, 1962 letter. Even Mr. Charles E. Wilson, the trustee, who was one of plaintiff's main witnesses, admitted that the plaintiff never specifically told him that plaintiff was entitled to the 5% commission at the moment Mr. Wilson accepted the trusteeship.

6. In plaintiff's letter of July 13, 1960 (9 months after the alleged promise had been made) to Dr. Sturzenegger the following appears concerning plaintiff's compensation:

> (Dr. Frey) . . . appeared inordinately concerned about my personal welfare and affairs, and seemed worried that, whereas had this matter eventuated in 1958-1959, I would have been assured good treatment, on the other hand, perhaps Schaefer and Union Bank would be otherwise. I told him that, *although I had no deal, I was not primarily concerned here at the moment,* but that there was a job to be done, independently, by an independent trusteeship, for the good all around to end this sad case properly. Enough said here. (Emphasis added)

If plaintiff had a firm promise for a 5% commission in October, 1959, it is highly unusual that he should tell his close confidant in July, 1960 that he had "no deal" and was not "primarily concerned" with a deal but with getting the job done.

7. As shown above, plaintiff's family was very deeply involved in Interhandel's history. Plaintiff, time and again, claimed that his primary concern was to force the United States Government to correct what he considered to be a grievous injustice to his family and to the Swiss. Such evidence shows the existence of motives other than monetary for plaintiff's actions.

8. Plaintiff claims that he was offered the 5% commission if he could convince Mr. Charles E. Wilson to act as Interhandel's agent. To be sure, the whole Interhandel affair was unique and unprecedented. Such situations do require something more than the usual mode of operating. And yet, it strains credulity to believe that such a large commission was offered to do so little.

The idea of a trusteeship had been broached to Mr. Charles E. Wilson at least ten months prior to plaintiff's October, 1959 meeting with Dr. Schaefer. It is true that Mr. Wilson had not accepted the trusteeship in October, 1959, yet he had been considering it for some time. He insisted on being convinced of the validity of the Swiss claim. This plaintiff attempted to do. Plaintiff gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved.

Mr. Wilson also made it clear that he would not act for the Swiss unless his own government gave at least tacit approval.

All of this had transpired prior to plaintiff's October, 1959 meeting. While it cannot be said that Mr. Wilson was totally committed to accepting the trusteeship in October, 1959, it also cannot be said that the idea was totally foreign to him. In other words, after October, 1959, it is highly questionable whether plaintiff had to do much convincing of Mr. Charles E. Wilson.

9. Prior to this, plaintiff had received generous offers from various American corporations to act as their agent in procuring GAF assets. But the largest offer was for $900,000.00 from Shields & Co. if plaintiff's negotiations with Interhandel brought about a sale of GAF.

It is not reasonable that plaintiff should be offered over $6,000,000.00 (5% on the $121,000,000.00 settlement) for his activity as a *finder* of an agent when he was offered $900,000.00 by another corporation for his activity as the *primary agent* and primary negotiator in securing GAF assets.

In sum, the court is convinced that there is no evidence —except plaintiff's *ipse dixit*—of the existence of an express oral contract to pay a 5% commission. Plaintiff has failed to prove an express contract.

Opinion.

RELIEF ON AN IMPLIED CONTRACT OR IN QUASI-CONTRACT

Failure to recover on an express contract does not preclude recovery on an implied contract or in quasi-contract. In a case like the one at bar, where one renders services at the request of another, with the expectation of compensation, and in the process, confers a benefit on another, something in the nature of an implied contract results. *Hill* v. *Waxberg,* 237 F.2d 936 (9th Cir. 1956); *U.S.* v. *Alpha-Continental, et al.,* 273 F.Supp. 758, 775 (E.D. N.C. 1967); *St. Louis Testing Lab., Inc.* v. *Mississippi Valley Structural Steel Co.,* 254 F.Supp. 47, 55 (E.D.Mo. 1966), *aff'd* 375 F.2d 565 (8th Cir. 1967); 1 Williston, *Contracts,* Sec. 36 (3rd ed. 1957).

The law recognizes an obligation of the employer to pay reasonable compensation for these services. *Woodruff* v. *New State Ice Co.,* 197 F.2d 36, 38 (10th Cir. 1952); *In re Moyer,* 190 F.Supp. 867, 873 (W.D.Va. 1960); *T. O. Metcalf Co.* v. *Crossroads, Inc.,* 121 Vt. 147, 151 A.2d 307, 311 (1959); 98 *C.J.S.,* Work & Labor, Sections 65, 66(2) (1957).

Cases which enunciate such principles often use either an implied contract or a quasi-contract as the vehicle for providing relief. Often courts are rather inexact in defining whether an implied contract exists or whether plaintiff is entitled to relief on a quasi-contract to prevent unjust enrichment. 3 Corbin, *Contracts,* Sec. 566 (1960).

It is certainly reasonable for the court to find that the facts of this case entitle plaintiff to relief on either theory. On either theory, plaintiff has shown that he is entitled to reasonable compensation for his services.

As was pointed out in *Hill* v. *Waxberg, supra,* at p. 939:

> While the distinction (between an implied contract and a quasi contract) may be somewhat doctrinaire, the application of certain formalized distinctions is

necessary in order to arrive at the proper measure of damages.

If a true contract of employment exists, the measure of damages is the usual compensatory scheme of contract damages which is measured by the compensation usually paid in the community for those services. If relief is truly in quasi-contract, the employer is required to pay compensation for the benefit he has received.

While there are technical differences between the implied contract measure of damages and the quasi-contract measure, in suits for compensation, these different formula produce the same results.[7] The employer is required to pay compensation equal to the reasonable value of the services rendered.

It is up to the court as fact-finder to determine what is the reasonable value of the plaintiff's services to defendant. However, it is axiomatic that the fact-finder cannot decide an issue unless there exists some evidence at trial on that issue. There must be something introduced in evidence upon which the fact-finder can base a verdict. Speculation cannot supply the place of proof. *Moore* v. *Chesapeake & Ohio Railroad Co.,* 340 U.S. 573, 578, 71 S.Ct. 428, 430, 95 L.Ed. 547, 550-551 (1951); *Controller of California* v. *Lockwood,* 193 F.2d 169, 172 (9th Cir. 1951); *McNamara* v. *American Motors Corp.,* 247 F.2d 445, 450 (5th Cir. 1957).

In the case at bar, the issue which the court must determine concerns the reasonable compensation to which plaintiff is entitled for the services he performed for defendant.

When there has been no evidence as to the reasonable value of plaintiff's services, the fact-finder has nothing upon which to base its verdict—except sheer speculation.

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[7] Cf. Costigan, Implied-in-Fact Contracts, 33 *Harv.L.Rev.* 376, 383 (1920).

In a suit for compensation for services rendered, there can be no recovery unless there has been some evidence of the reasonable value of plaintiff's services.

As was said in *Sullivan* v. *District of Columbia Paper Mills,* 67 R.I. 330, 23 A.2d 765, 767-768 (1941):

> Assuming that the plaintiff performed some such services, we find in the record before us no evidence showing their reasonable value. If the plaintiff is attempting, under the common counts, to recover compensation for such services from the defendant, he has the usual burden of proof, as part of his case, to establish by competent evidence their reasonable value . . . There is no direct evidence as to the reasonable value of these services. Any finding by us as to such value would, therefore, be based on conjecture.

Failure to establish the reasonable value of plaintiff's services in a suit for compensation based on implied contract or on quasi-contract is fatal to recovery. The authorities on this point are unanimous. E.g., *Grau* v. *Mitchell,* 156 Colo. 111, 397 P.2d 488, 489-490 (1964); *T. O. Metcalf Company* v. *Crossroads, Inc.,* 121 Vt. 147, 151 A.2d 307, 311 (1959); *Bianco* v. *Floatex, Inc.,* 145 Conn. 523, 144 A.2d 310, 312 (1958); *D'Avanzo* v. *Shreveport Restaurants, Inc.,* 71 So.2d 698, 699 (La.App. 1954); *Reeves* v. *Vallow,* 95 P.2d 945, 946 (Cal.App. 1939); *Automatic Sprinkler Corporation of America* v. *Ruffner Hotel,* 110 W.Va. 67, 156 S.E. 887 (1931); *Meyer-Kiser Corporation* v. *Dooley,* 100 Fla. 243, 129 So. 592 (1930); *Terry Realty* v. *Noctin,* 220 Ala. 282, 124 So. 901, 903 (1929); *In re Davies Estate,* 289 Pa. 579, 137 A. 728, 731 (1927); *Winch* v. *Warner,* 174 N.Y.S. 819, 822 (App.Div. 1919); *McDaniels* v. *Harrington,* 80 Ore. 628, 157 P. 1068, 1070 (1916); 98 *C.J.S.,* Work & Labor, Sections 57, 65.

Without some evidence as to reasonable value of plaintiff's services, the court simply has no basis for a decision —other than speculation.

Opinion.

In cases where the value of services is of common knowledge, the fact-finder is permitted to establish value from its own knowledge. *Dewald* v. *Norris*, 397 S.W.2d 738, 743 (Mo.App. 1965); 98 *C.J.S.*, Work & Labor, Sec. 57.

These cases involve some very common type of service such as nursing. Certainly the case at bar does not fall within this exception to the general rule.

The court is compelled to deny recovery in the case at bar. There is no evidence as to the value of the plaintiff's services. There was evidence concerning the compensation other corporations were willing to pay the plaintiff for his services as their agent in negotiating a purchase of GAF assets from Interhandel. But this is not evidence of the value of plaintiff's services for defendant as the finder of Mr. Charles E. Wilson. Certainly, services rendered as the prime agent and prime negotiator are materially and substantially different from those for which plaintiff now seeks compensation.

None of the above mentioned evidence concerned the reasonable value of plaintiff's services in procuring the services of Mr. Charles E. Wilson.

Failure to prove the reasonable value of plaintiff's services is fatal to recovery.

Judgment will be entered for defendant.

This Opinion will serve as the court's Findings of Fact and Conclusions of Law.

JOSEPH C. MCGARRAGHY
Judge

May 7, 1970

Order of Affirmance.

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24,600 (No Opinion)
September Term, 1971

Civil Action No. 85-67

ROBERT A. SCHMITZ, Appellant

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, TAMM and MACKINNON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, and this court being in agreement with the findings of fact and conclusions of law filed by the District Court, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed. *See also* 6A J. MOORE, FEDERAL PRACTICE ¶ 59.07 (1971).

Per Curiam

J.S.W.
E.A.T.
G.E.M.

Order Denying Reconsideration.

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24,600 September Term, 1971

Civil Action 85-67

ROBERT A. SCHMITZ, Appellant

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc.

Before: WRIGHT, TAMM and MACKINNON, Circuit Judges.

ORDER

On consideration of appellant's motion for reconsideration, it is

ORDERED by the Court that appellant's aforesaid motion is denied.

Per Curiam
For the Court:

NATHAN J. PAULSON
Clerk

Circuit Judges Leventhal and Robb did not participate in the foregoing order.

JUL 13 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1617

ROBERT A. SCHMITZ, *Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. also known as INTERNATIONALE INDUSTRIE UND HANDELSBETEILIGUNGEN, A.G., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the District Court judge abused his discretion when he denied petitioner's motion for reconsideration or to open the judgment to take additional testimony as to the reasonable value of his services when petitioner elected not to present such evidence at the trial.

COUNTERSTATEMENT OF THE CASE

The trial judge stated in his opinion [1] that the case was tried in such a manner that relief would be proper under any of three theories:

1. Express contract; or
2. Implied contract to pay a reasonable compensation; or
3. Relief in quasi-contract to prevent unjust enrichment of the defendant.[2]

The case was tried principally upon the claim of an express contract to pay petitioner a finder's fee equal to five percent (5%) of the recovery for the sole and single service of procuring the willingness of Mr. Charles E. Wilson to act as negotiator for respondent with the American Government.[3] The petitioner does not complain about the action of the lower courts in denying him any relief under this theory, the trial judge having stated that "it strains credulity to be-

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[1] This opinion, which serves as the court's Findings of Fact and Conclusions of Law, is printed in an appendix to the petition, the pages being numbered 19-34. References to this opinion in the brief will be cited as Op. —. Citations to "J.A." have reference to the joint appendix filed in the Court of Appeals which respondent has designated for transmission to this Court.

[2] The trial judge treated theories two (2) and three (3) as leading to the same result, and dealt with them jointly, stating at Op., p. 32:

> "While there are technical differences between the implied contract measure of damages and the quasi-contract measure, in suits for compensation, these different formula produce the same results. [Citing "Cf. Costigan, Implied-in-Fact Contracts, 88 Harv. L. Rev. 376, 383 (1920)"] The employer is required to pay compensation equal to the reasonable value of the services rendered."

[3] While testifying at the trial, Mr. Charles Wilson rejected out of hand the idea that petitioner's fee was tied merely to procuring him to undertake the task (R. 60, pp. 1223-4; J.A. 980-1).

lieve that such a large commission was offered to do so little." (Op., p. 29).

In both lower courts, petitioner urged the alternative remedies, but at no time did he claim any sum thereunder other than five percent (5%) of $121,000,000 (the net amount payable to respondent) or of $145,000,000 (the gross amount subject to deductions for taxes, etc.).

The petitioner seeks review solely of the lower court's action upon his post-trial Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony. In order to give the Court a full picture of the proceedings upon this motion, respondent has printed as an appendix to this brief the entire related record, including the motion, supporting and opposing memoranda and the transcript of oral argument before the trial judge.

Petitioner states at page 2 of his petition, under the title of "Opinions", that no opinion was delivered by the trial judge in denying his motion. The judge did file an order of denial (p. 42a, Appendix, this brief) which sheds light upon his reasoning. The pertinent paragraph reads:

> "After thorough consideration of plaintiff's Points and Authorities, and after oral argument, the court is of the opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial.[4]

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[4] In footnote 1 on page 1 of the petition, and in the last sentence on page 13, it is suggested that the Judgment of Affirmance of the Court of Appeals does not mention the trial judge's order of denial of these motions. Respondent submits that the citation in the Order of Affirmance of "6A J. Moore, Federal Practice ¶ 59.07 (1971)" does just that; moreover, since this point was briefed and argued by both parties in the Court of Appeals, it is clear that the affirmance related to all actions taken by the trial judge.

Respondent agrees with petitioner that "the basic facts in the case, as found by the court, are stated in the opinion of" the trial judge (Pet. p. 5). Therefore, a reading of that opinion is sufficient to provide a clear picture of the case. However, the petition's fact statement departs from the opinion and findings of the trial court and includes assertions which are either not consistent with those findings or are irrelevant to the case in its present posture.

To understand this criticism by respondent, focus must be directed at the contention of petitioner, namely, that he earned between six and seven million dollars for services rendered to respondent from 1958 to 1960 solely in procuring Mr. Charles Wilson to act as negotiator. (See first sentence of first full paragraph on page 5 of petition.)[5] This is reinforced by petitioner at page 8 by the following:

> "* * * from the end of November 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers—a period of 18 months—petitioner devoted all of his time, attention and his own money re-

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[5] This sentence should not be read as stating that settling the dispute was a condition to earning his compensation. The word "settle" is actually used in the infinitive mood and thus should be read with the word "to" in front of it. See the second paragraph of the trial court's Opinion under the title "Express Contract" (Op., pp. 26-27) which reads as follows:

> "As heretofore stated, plaintiff claims that, on October 26, 1969, Dr. Schaefer, the chief Director of Interhandel, orally promised him 5% of the value of any proceeds Interhandel might obtain in a settlement with the United States Government on condition that the plaintiff procure the services of Mr. Charles E. Wilson as trustee for Interhandel. *Plaintiff claims he had a vested right to the 5% commission at the moment Charles E. Wilson accepted the trusteeship in May, 1960, regardless of the means by which a settlement was accomplished,* but that actual payment would of necessity be delayed until the settlement fund actually became available." (Italics supplied)

sources, as well as much travel, to bring about the desired result."

On the other hand, the trial judge correctly understood the period in question to be from October 1959 to May 1960. This was due to the fact that until April 1959, petitioner was dealing with Dr. Sturzenegger as the leader of a stockholders' group (R. 55, p. 85). During this period Dr. Sturzenegger was not acting as an agent for respondent nor did petitioner have dealings "with other agents of respondent" (see first two lines of first full paragraph on page 8 of the petition). Dr. Sturzenegger resigned from any official connection with respondent in early 1958 (R. 54, pp. 21-2; R. 55, pp. 85, 94-5; R. 58, pp. 561-2, 573-4; R. 61, pp. 1044-5; R. 64, pp. 1276-9). Dr. Sturzenegger wrote petitioner on September 22, 1958 (R. 58, pp. 561-2) that he had resigned from the board of directors of respondent and "I have no influence on the destiny of the company and the resolution of the GAF problem being strived (sic) for for many years." (See Op., p. 22). Also, during part of this period, respondent was a paid representative of Food Machinery Company with regard to its acquiring respondent's stock interest in GAF (R. 55, pp. 79-80; R. 57, pp. 501-3; Pl. Ex. 9; R. 76: 79, 81). As late as April 23, 1959, petitioner wrote Dr. Sturzenegger a letter in which he acknowledged he had no mandate to act on behalf of either Dr. Sturzenegger or respondent (Deft. Ex. 54; R. 63: 1206, 1206; Pl. Ex. 18; R. 55; 116, 116). The evidence shows that because of respondent's activities with another interested American group (Pl. Ex. 21; R. 55: 127, 128; Pl. Ex. 21(a); R. 55: 127, 128 nothing relevant to this petition occurred after this until petitioner's meeting with Dr. Schaefer in October, 1959. This "hiatus" was noted by the trial judge (Op., p. 23). Therefore, the period in issue was October 29, 1959 through May 23, 1960.

The quotation from the trial court's opinion at the top of page 18 of the petition is taken out of context. A reading of the related text of the opinion demonstrates this, as well as showing how little work petitioner had to do between October 1959 and May 1960. The following is the text to which respondent refers:

> "The idea of a trusteeship had been broached to Mr. Charles E. Wilson at least ten months prior to plaintiff's October, 1959 meeting with Dr. Schaefer. It is true that Mr. Wilson had not accepted the trusteeship in October, 1959, yet he had been considering it for some time. He insisted on being convinced of the validity of the Swiss claim. This plaintiff attempted to do. Plaintiff gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved.
>
> "Mr. Wilson also made it clear that he would not act for the Swiss unless his own government gave at least tacit approval.
>
> "All of this had transpired prior to plaintiff's October, 1959 meeting. While it cannot be said that Mr. Wilson was totally committed to accepting the trusteeship in October, 1959, it also cannot be said that the idea was totally foreign to him. *In other words, after October, 1959, it is highly questionable whether plaintiff had to do much convincing of Mr. Charles E. Wilson.*" (Italics supplied)[6]

In the paragraph on page 8 of the petition where petitioner fixes the period of time to be "from the end of November 1958 until May 23, 1960" he includes the following sentence":

> "In confirmation that petitioner was acting for respondent as its authorized agent in these nego-

[6] Mr. Charles Wilson commenced advocating the justice of respondent's cause as early as 1957. (R. 61, pp. 1046-7)

tiations, respondent, in May of 1960, reimbursed petitioner $13,733 for out-of-pocket expenses previously incurred."

Obviously the reader would infer that these expenses went back to November, 1958. On the contrary, Deft. Exhibit 50 (R. 62, 1147, 1148) is petitioner's bill for this sum, dated May 4, 1960 and is entitled "Expenses and Disbursements incurred during seven months from approximately October 1, 1959 up to May 1, 1960."[7]

Petitioner's references to the efforts of Mr. Charles Wilson and Mr. Wilson's attorney to settle the case, the interruption of these efforts by Dr. Schaefer of Union Bank, and the alleged violation of the "irrevocable" authority to Mr. Wilson to act for respond-

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[7] "May 4, 1960

"Interhandel A.G.—Union Bank of Switzerland—Dr.

To

"Robert A. Schmitz

"Expenses and disbursements incurred during seven months from approximately October 1, 1959, up to May 1, 1960 $13,733.00

"Kindly have an account set up with your Bank in my name to cover this amount, and immediately forward a cabled draft of $10,000.00, care of Mrs. Marion B. Schmitz, Special Account, Fairfield County Trust Company, Greenwich, Connecticut, whom I desire to act as my agent to collect said draft.

"Perhaps, in the absence of Dr. Schaefer, your Bank may wish to handle this matter through Mr. Bruno M. Saager, Deputy General Manager.

Very truly yours,

Robert A. Schmitz"

ent—which was denied by respondent at the trial,[8] are not only irrelevant to petitioner's reasons for granting certiorari, but are contradicted by the trial court's opinion and findings. The following quotations from the opinion illustrate what respondent means:

> "The evidence is not clear as to the extent of the negotiations between Mr. Wilson and Mr. Spofford on the one hand, and the Department of Justice on the other, although it is clear that contact was made with the Department and possible settlement arrangements were discussed, but without finality.
>
> * * *
>
> "After Dr. Schaefer's direct negotiations with Mr. Kennedy, Mr. Wilson expressed a willingness to withdraw completely as trustee. From the October, 1961 meeting between Mr. Kennedy and Dr. Schaefer, Mr. Wilson ceased to participate in any negotiations concerning Interhandel. In March, 1963, he formally terminated his trusteeship.
>
> * * *
>
> "Plaintiff contends that, except for the intervention of Dr. Schaefer, Mr. Charles E. Wilson would have been able to negotiate a disposition of the matter at least as favorable, and possibly more favorable to Interhandel, than that which was the result of the intervention of Dr. Schaefer with the Attorney General.
>
> "This obviously is pure speculation. No agreement had been reached during the period when Mr. Charles E. Wilson and his attorney, Mr. Spofford, were actively engaged and the record is devoid of any evidence from which a determination can be made of the part which their efforts contributed to the ultimate result which was accomplished."

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[8] Dr. Schaefer testified—and the written evidence proved—that Mr. Wilson agreed that whenever respondent wished him to terminate the power of attorney, he would be willing to do so (R. 64, pp. 1301-4, R. 64, p. 1361, R. 65, pp. 1405-6; Deft. Ex. 7; R. 58: 607, Deft. Ex. 59; R. 63: 1243, 1244; Pl. Ex. 145; R. 60: 942, 943).

At page 10 petitioner states that the activities of Dr. Schaefer were conducted "secretly and without the knowledge of Mr. Wilson." The facts at trial showed the opposite to be true. Dr. Schaefer proceeded openly in every respect. The evidence showed that Charles Wilson made no headway during the Republican Administration. Dr. Schaefer became impatient with the lack of progress and decided he would personally come to the United States to see for himself what was the status of the matter (Op., p. 24; R. 65, p. 1452; R. 66, p. 1578). This decision was explained to petitioner thereafter, Mr. Spofford in a letter of March 31, 1961, endorsed Dr. Schaefer's program and reconfirmed the willingness of Charles Wilson to surrender the trusteeship whenever requested (Deft. Ex. 67; R. 65: 1511, 1512). Mr. Wilson's willingness to relinquish the trusteeship is contained in his letter of March 27, 1961 (Pl. Ex. 145; R. 60: 942, 943). Dr. Schaefer's negotiations were well known to Charles Wilson and Mr. Spofford and they even went so far as to advise on certain strategies during the negotiations (Pl. Ex. 172; R. 60: 953, 953; Pl. Ex. 189; R. 64: 1345, 1346; Pl. Ex. 143; R. 60: 939, 939; Pl. Ex. 144 R. 60, 939, 941; Deft. Ex. 58; R. 63: 1237, 1237; Deft. Ex. 62; R. 66: 1607, 1612; Deft. Ex. 63; R. 66: 1608, 1612; Deft. Ex. 74; R. 66: 1624, 1626, R. 66, pp. 1594, 1596, 1609-11; R. 62, pp. 1370-2, 1415-16).

The reference to petitioner's services for a number of American corporations (Pet. 6-7) is wholly without relevance to the object of the petition. These services were rendered to and for the corporations named, and not for respondent. Accordingly, the statement that petitioner "expended a great deal of time, money and effort" has nothing whatever to do with his claim for compensation against respondent. By his own

testimony petitioner fixes the time of these activities to have been from 1947 through December, 1958 when his employment agreement with Food Machinery Company expired.[9]

Finally, the services rendered by petitioner *after* May 1960, when Mr. Charles Wilson accepted his commission, and referred to by petitioner on page 10 of his petition, are another example of diversionary tactics. Not only is no claim *now* being made for such services, but, in addition respondent paid petitioner $2,000 a month for 19 months beginning with June 1960 for these services.[10] Petitioner was dissatisfied with the amount of these payments and added a second count to his complaint for a total of $150,000 for that period, but without explanation he dismissed that count at the beginning of the trial. See the three opening paragraphs of the trial court's opinion.[11]

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[9] The trial judge pointed out that the largest offer to petitioner came from Shields & Company—$900,000 if petitioner's negotiations with respondent brought about a sale of GAF (Op., p. 30); and added near the end of his opinion that such was not evidence of the value of petitioner's services as a finder.

> "... Certainly, services rendered as the prime agent and prime negotiator are materially and substantially different from those for which plaintiff now seeks compensation." (Op., p. 34)

[10] See the trial court's opinion at Op., p. 28 where it is stated:

> "4. Plaintiff was compensated, at $2,000 per month, for services rendered Interhandel *after* Mr. Wilson accepted the trusteeship. This compensation continued from June 1, 1960 through December 31, 1961 . . .".

[11] These three paragraphs are quoted as follows:

> "Plaintiff, Robert A. Schmitz, seeks compensation for services rendered defendant corporation, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. (hereinafter Interhandel).
>
> "Plaintiff's complaint and pre-trial statement listed two counts. The first was for services rendered as a 'finder' who

The trial judge devoted several pages of his well-reasoned opinion to a discussion of the measure of damages, the burden of proving such damages and the evidence presented at trial. He stated that without some evidence as to the reasonable value of the services rendered he would have to engage in impermissible speculation as to the amount of damages and he concluded that since there "was no evidence as to the value of plaintiff's services" he was compelled to deny recovery (Op., pp. 32-34).

Following the adverse opinion of the trial judge, petitioner moved for reconsideration or alternatively, to open the judgment and take additional testimony (App., pp. 2(a)-7(a)). The reconsideration portion of the motion urged (1) that the trial court's determination that there was no express agreement was against the weight of the evidence and (2) that there was ample evidence present "to demonstrate the value of [petitioner's] services". The portion of the motion requesting the court to reopen the proceedings was couched in the following language:

> "7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him." (App., p. 4a)

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procured Mr. Charles E. Wilson to act as agent for Interhandel. The second was for services rendered to Interhandel after Mr. Wilson consented to represent Interhandel.

"At trial, plaintiff announced that he would proceed only with Count 1, that is, for compensation for procuring the services of Mr. Wilson. Only this is before the court."

Petitioner enlarged upon these points in a memorandum of additional points and authorities filed in support of his motion. With regard to reopening, the memorandum said:

> "While plaintiff believes that there is ample evidence in the trial record to enable the Court to assess the damages to which he is entitled, it may be that the Court will wish to hear certain additional testimony on the question of the value of plaintiff's services. Attached hereto as Exhibit "B" is the affidavit of Charles E. Wilson which would indicate certain additional matters as to which he could testify if afforded the opportunity to do so. Plaintiff expects to obtain expert testimony from the financial community in New York City bearing on this issue. Accordingly, if the Court is not satisfied with the state of the record on the question of the value of plaintiff's services, plaintiff respectfully requests the Court to reopen the judgment to enable the plaintiff to adduce additional testimony by the trustee and by certain experts in the field of industry and finance." (App., pp. 22a-23a)

The affidavit of Charles Wilson [12] contained only two statements of substance, neither of which can be reconciled with the case petitioner presented at trial:

(1) That the fixing of the amount of petitioner's "fees" was in affiant's sole discretion.

(2) That it was affiant's "firm judgment" from April 30, 1960 "that the reasonable value of the *said services* . . . was not less than five percent (5%) of the sums recovered"; and that affiant would have paid petitioner not less than 5% (emphasis supplied).

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[12] Since Mr. Charles Wilson is now dead, the substance of his affidavit is not provable, even assuming it to have contained acceptable evidence. As shown hereinafter, it is not in accordance with the facts.

During the arguments on the post-trial motion, petitioner made it perfectly clear that he had adduced no evidence of the value of his services and that this decision was made because petitioner felt that a percentage of the ultimate settlement would be the appropriate measure:

> "THE COURT: So, we do have a situation, if I may interrupt you, we do have a situation where for a period of time between the time that Mr. Schmitz went to work on this project and the time Mr. Wilson was appointed, accepted the trusteeship, Mr. Schmitz rendered some services.
>
> "Have you offered any evidence as to the value of those services?
>
> "MR. O'DONOGHUE: No, we have not, because we consider that they were related to the result . . .". (App. p., 41a)

The trial court made it equally clear that the "result" was not due to petitioner's services. The Opinion (pp. 24-25) so stated and in the following colloquys the trial judge reaffirmed that conclusion:

> "THE COURT: I don't have any recollection of having found the services rendered by Mr. Schmitz—
>
> "MR. O'DONOGHUE: —quasi—
>
> "THE COURT: (Continuing)—had any causal relation with the enrichment of Interhandel. Do I make that clear?
>
> "MR. O'DONOGHUE: I see what you mean, that his services did not contribute to the result?
>
> "THE COURT: Not the result of.
>
> "MR. O'DONOGHUE: I don't know that your Honor found that they did not.

"THE COURT: I think I did. I think that's a reasonable interpretation of it. I found he rendered a service, but I don't think I found those services contributed in any way to the settlement that was ultimately negotiated." (App., p. 30a)

* * *

"THE COURT: Don't you, in every instance, use your percentage figure as a percentage of the settlement?

"MR. O'DONOGHUE: Yes.

"THE COURT: —or of some other settlement which would have been larger than that ultimately accomplished?

"MR. O'DONOGHUE: That's right.

"THE COURT: Haven't I found Mr. Schmitz did not accomplish that?

"MR. O'DONOGHUE: Well, let us suppose your Honor has done that. You have certainly stated it today." (App., pp. 40a-41a)

After such full briefing and oral argument the trial court denied the motion saying, in part:

"... the court is of opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial." (App., p. 43a)

This decision was fully briefed, argued and affirmed by a unanimous Court of Appeals in a *per curiam* order of affirmance which expressed the appellate court's "agreement with the findings of fact and conclusions of law filed by the District Judge" (Pet., App., p. 35) [13]

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[13] See footnote 4, *supra*.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS' DECISIONS WITH REGARD TO THE POST-TRIAL MOTION WERE REQUIRED BY UNIFORM LAW AND THE DECISIONS OF THIS COURT

The memoranda of the parties with respect to the post-trial motion in the District Court are included in the Appendix hereto so that this Court may see at first hand the narrow extent of petitioner's presentation to the trial judge as well as respondent's analysis of petitioner's position.

The petition herein is based on two principle contentions, the first being that the lower courts misconstrued the federal rule as to damages; and the other, that the trial judge's denial of the alternate motion to open was an abuse of discretion.

Prior to answering these contentions, respondent will answer that part of page 14 of the petition which mentions that the record contained three indicia of the worth of petitioner's services. The first concerned his agency agreements with American corporations interested in acquiring respondent's stock in GAF. The trial court discussed this and concluded that such agreements did not measure the value of petitioner's services as a "finder" of Charles Wilson (Op., pp. 30, 34). The lower court was obviously correct. The second so-called indicia has to do with the alleged rise in the market price of respondent's stock. This rise was in no way a measure of the value of petitioner's services as a finder. Moreover, it benefited stockholders—not respondent. The third, which has to do with Charles Wilson's payment of claims of between twenty and thirty million dollars, is certainly no proof of the value of petitioner's services. In fact, Charles Wilson had no

idea what claims were to be satisfied with that amount of money (R. 59, p. 892) and he did not during the trial state that he was to pay petitioner any part of that sum. The evidence showed that respondent actually paid twenty-four million dollars to satisfy the government's tax claim and to pay for the value of respondent's shares in the possession of the attorney general (R. 65, pp. 1521-5). In sum, the trial court's conclusion that there was *no evidence* as to the value of petitioner's services is well supported and the denial of reconsideration was required.

The following will show that there is no merit in petitioner's two principal contentions and that, under Rule 19 of this Court, there are no special or important reasons for granting the writ.

A. The Lower Courts Did Not Misconstrue the Federal Rule as to Damages.

The trial judge was faced with an absolute void in the proof of damages. The fact that there was none is traceable to a deliberate decision by petitioner whose trial strategy was aimed at a judgment of 5% of either $121,000,000 or $145,000,000.[14] This much was conceded when petitioner's attorney, during argument of the post-trial motion, explained that no evidence as to the value of petitioner's services had been offered ". . . because we consider that they were related to the result . . ." (App. p. 41a). In the same response counsel further explained:

> "We have not presented evidence on that because we believe the whole thing was so intimately tied together as to not be capable of divorcement."

[14] During argument in the Court of Appeals, Judge Wright observed that petitioner "had gone for broke."

On these facts, the courts below properly construed and applied the law. The opinion of the trial judge discussed the applicable principles and said:

> "It is up to the court as fact-finder to determine what is the reasonable value of plaintiff's services to defendant. However, it is axiomatic that the fact-finder cannot decide an issue unless there exists some evidence at trial on that issue. There must be something introduced in evidence upon which the fact-finder can base a verdict. Speculation cannot supply the place of proof." (Op., p. 32, citations omitted)

This statement is not a misconstruction; it accords in every respect with the teachings of this Court which uniformly require that there must be evidence to support an award of damages.

The cases cited by petitioner are not to the contrary. In *Hetzel* v. *Baltimore & Ohio Railroad Company,* 169 U.S. 26, 42 L.ed 648 (1898), this Court noted, in a suit for damages for the obstruction of the plaintiff's property by the railroad, that the plaintiff introduced testimony "of experts as to the value of the land with the D street track there and with that track removed" and testimony of real estate agents as to the inability of plaintiff to sell the land because of the obstruction (169 U.S. at 29). Thus, there was substantial evidence upon which damages could have been predicated.

Eastman Kodak Co. v. *Southern Photo Materials Co.,* 273 U.S. 359, 71 L.ed 684 (1927), involved damages for loss of business in an anti-trust action. This Court summarized the specific evidence pertaining to damages (273 U.S. at p. 376) and observed that the evidence

was such that the jury did not have to speculate or guess.

In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 90 L.ed 652 (1946), this court held that "even where the defendant by his own wrong has prevented a more precise computation [of damages], the jury may not render a verdict based on speculation or guesswork . . .". Having stated this principle, this Court examined the evidence and concluded there was support for the damage award (327 U.S. at p. 266).

In *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 85 L.ed 336 (1941), this Court stated the principle that the requirement of certainty as to the amount of damages requires that the evidence be such as to provide "a basis for a reasoned conclusion" (311 U.S. at p. 561).

Petitioner's other authorities are to the same effect. Each requires that the *evidence* show the extent of the damages at least as a matter of reasonable inference. Here, petitioner's failure to establish the reasonable value of his services is fatal to recovery and the courts below were required to so hold.

B. The Trial Court, in the Exercise of Its Discretion, Properly Denied Petitioner's Motion To Reopen.

The trial judge must exercise a sound discretion when deciding a motion for new trial under Rule 59(a) of the Federal Rules of Civil Procedure, and his decision will not be reversed unless there is a clear abuse of that discretion. *Knight* v. *Hersh*, 114 U.S. App. D.C. 198, 313 F.2d 879 (1963); *Bates* v. *Hensley*, 414 F.2d 1006, 1011 (8th Cir. 1969); and *United States* v. *Bucon Construction Company*, 430 F.2d 420 (5th Cir. 1970). For the reasons which follow, respondent submits the trial court did not abuse its discretion.

Petitioner's motion does not make the showings required under Rule 59(a), that (1) petitioner exercised due diligence timely to obtain the "new" evidence and (2) that the newly discovered evidence would probably change the result. *Knight* v. *Hersh, supra.* Implicit in these requirements is the further requirement that the new evidence be described with sufficient specificity to permit the court to apply the *Knight* v. *Hersh* criteria. Petitioner's motion to reopen did not make any of the three required showings.

Petitioner seeks to excuse his shortcoming by charging the trial judge with an abuse of discretion because "[t]he inconsistent decision of the trial court . . . caught petitioner by surprise" (Pet., p. 17). This is explained on the same page where petitioner says that he "fully expected the trial court to find that there was an express contract whereby he was to receive 5% of the amount of the recovery . . .". There was not only nothing inconsistent in the opinion but petitioner's attempted justification ignores the fact that he was required to prove all the elements of each of the alternate theories upon which he sought to recover. This he did not do.

The record before the trial judge showed that petitioner made a conscious choice not to present evidence as to the value of his services. The facts simply did not warrant a conclusion by the trial judge that petitioner exercised reasonable diligence.

In addition, petitioner made no showing that the evidence he hoped to obtain would be such as to change the decision. The thrust of the motion was that while sufficient evidence had been presented petitioner would obtain additional evidence *if the court thinks insufficient evidence was presented* (App., p. 5a). At this

time, it was encumbent upon petitioner, not the court, to take the initiative and advise the Court of the testimony he would offer at a reopening. Instead, counsel merely stated that petitioner *expects to obtain* expert testimony from the financial community in New York City *bearing on the value of* petitioner's services (App., 22a). This statement, which was included in the "Points and Authorities", did not even take the trouble to tell the court of what the expected "expert testimony" would consist. The most that was stated was that it would *bear upon* the value of plaintiff's services. Plaintiff had ample time both before and after the trial in which to develop such evidence and yet he failed to identify a witness or to describe the proposed testimony. Judgments would never be *final* if such representations could be the basis for re-opening a case. See District Judge Keech's remarks in *Rue* v. *Fuez Construction Co.*, (D.C.D.C. 1952) 103 F.Supp. 499 at page 502 *et. seq.* (App. 28a-29a), where he stated, in part:

> "Public policy and the court calendar are such as not to permit a party litigant to gamble on reliance on one theory at the trial and, after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet the other issues raised by that record, in an attempt to make for a finding in its favor on the theory adopted by the court."

The affidavit of Charles Wilson is not sufficient to indicate the probability of a changed result if he offered more testimony. His only two substantive statements are wholly inconsistent with petitioner's proof at trial. There was not one word during the trial that Charles Wilson had the "sole discretion" to fix the amount of petitioner's "fee". Moreover, if it had *al-*

ways been Mr. Wilson's "firm judgment" that the reasonable value of petitioner's services was 5%, the testimony was neither newly discovered, nor did he testify to that effect at trial.

Charles Wilson testified at trial that petitioner's fee was not tied merely to procuring him (Charles Wilson) to undertake the trusteeship (R. 60, pp. 1223-4). Therefore, in his affidavit he could not have been treating petitioner's compensation as a finder's fee and his testimony would not have been relevant to that issue.

Finally, the trial court's decision conformed to *Souza* v. *Corvick*, 142 U.S. App. D.C. 323, 441 F.2d 1013 (1970), another case where the plaintiff did not offer any evidence of the amount of damages to her house which developed cracks after a sewer was constructed near her property. A verdict was directed for the defendant. While the Court of Appeals reversed for a new trial on other aspects of the case, it specifically held that on retrial the plaintiff could not "introduce new evidence as to the amount of damage to her realty." (*Id.*, footnote, 6).

Respondent submits that there was no abuse of discretion by the lower courts.

II.

THE PETITION DOES NOT PRESENT A QUESTION JUSTIFYING THE GRANT OF CERTIORARI

No "Supreme Court question" is presented by the petition. This is a typical case which involves the exercise of a trial judge's discretion which has been reviewed and affirmed by the Court of Appeals—unanimously and *per curiam*—after extensive briefing and oral argument. It is patent that the considerations usually forming the basis for review require denial of

the petition and that the rule stated by Mr. Justice Brennan in *Appalachian Power Company* v. *American Institute of Certified Public Accountants,* 4 L.ed.2d 30, 32 (1959) [15] should be applied:

> "Ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Court in relation to a particular set of facts."

Petitioner has cited two recent cases of this Court to support his conclusion that certiorari should be granted. The first, *International Terminal Operating Co.* v. *N.V. Nedre Amerik,* 393 U.S. 74, 21 L.ed.2d 58 (1968), which petitioner characterizes as "an ordinary civil case", was actually a case involving denial of the Seventh Amendment right to jury trial. Moreover, the opinion specifically noted (393 U.S. at p. 75) that the decision of the Court of Appeals was in conflict with this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Elleman Lines, Ltd.,* 369 U.S. 355, 7 L.ed.2d 798 (1962).

The second, *Norfolk Monument Company, Inc.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 22 L.ed.2d 658 (1969), was an anti-trust case which involved denial of the right to a jury trial. The Court of Appeals had affirmed the trial court's grant of summary judgment for defendants. This Court found there were material issues of fact which called for resolution by a jury and it also noted that the principle reason for the trial judge's decision was not in accord with two decisions of this Court. Thus, neither of the

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[15] Not reported in U. S. Reports.

cases relied on by petitioner calls for the grant of certiorari in the instant case.

While petitioner cites the Due Process Clause of the Fifth Amendment of the Constitution as being involved here, this is not so. After citing the Constitutional provision on page 3 of the petition it is not again mentioned for the obvious reason that it is not involved. Nor is any Constitutional provision at stake as, for example, the unlawful deprivation of a jury trial or any other procedural defect.

CONCLUSION

The petition presents no sound reason for this Court to review the proceedings below and, accordingly, it should be denied.

Respectfully submitted,

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July 13, 1972

APPENDIX

APPENDIX

APPENDIX

Post Trial Proceedings

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Final Judgment

This cause came on for trial by the Court, a jury having been waived, and evidence having been adduced by the parties, and counsel having submitted proposed findings of fact and conclusions of law, and having orally argued their respective positions, the Court upon consideration of all of the foregoing on May 7, 1970 filed its Opinion herein, in which its Findings of Fact and Conclusions of law appear, and having found therein that all relief shall be denied plaintiff, it is, by the Court, this 15th day of May, 1970

ORDERED, pursuant to Rule 58 of the Federal Rules of Civil Procedure, that judgment be and it is hereby entered for the defendant; and that allowable costs shall be taxed against the plaintiff.

JOSEPH C. MCGARRAGHY
District Judge

Plaintiff's Motion for Reconsideration or, Alternatively, To Open the Judgment and Take Additional Testimony

Comes now the plaintiff, by counsel and moves this Honorable Court to reconsider its opinion and judgment in the above referenced civil action and to open the Judgment, heretofore entered, and take additional testimony, and in support thereof states as follows:

1. The Opinion of the Court in lieu of Findings of Fact and Conclusions of Law was filed in this case on May 7, 1970, and a Judgment in favor of the defendant was entered on May 15, 1970.

2. Plaintiff's action was predicated upon two bases: (a) an oral contract with defendant whereby, if plaintiff was successful in obtaining the consent of Charles E. Wilson to serve as trustee for defendant in connection with its effort to resolve its long-pending suit against the government, plaintiff would be paid 5% of the avails of such settlement, out of the fund itself, by the trustee, and (b) an equitable lien upon the fund. In its Findings and its Conclusions, the Court rejected both bases and disallowed any recovery by plaintiff for the services which he rendered to defendant.

3. The Court's determination that plaintiff failed to prove his oral contract is against the weight of the evidence. In support of its determination, the Court has set forth nine separate circumstances which it apparently feels discredit the evidence plaintiff presented in support of his claim. It should immediately be noted that the Court apparently was reacting to what appeared to be the cumulative effect of these circumstances since none of the nine matters cited, standing alone, could rebut plaintiff's assertion.

4. The contract was not in writing and for good reason. The GAF controversy was a tremendously complex international controversy involving hundreds of millions of dollars. Because the settlement of this matter involved high finance, politics and much emotion, any effort to bring about such a settlement had necessarily to be a very sensitive

endeavor and had to be accomplished without harmful publicity. For this reason plaintiff was required by the defendant and later by the trustee to remain out of the limelight. The wisdom of this requirement is pointed up by the attached newspaper article which appeared when the plaintiff herein sought to intervene in defendant's return suit (Civil No. 4360-48), and which is designated as Exhibit "A" hereto. Moreover, because plaintiff trusted the promises of the defendant made to him in Zurich and in Paris (See, e.g., Pl. Ex. No. 70) and because he knew and respected the trustee who would be satisfying plaintiff's claim, plaintiff had no reason to believe that he would not be paid out of the Thirty Million Dollars ($30,000,000.00) which Dr. Schaefer told the trustee he could spend in order to satisfy claims. (See, Tr. 228, 892) Plaintiff's letter of July 13, 1960, (Def. Ex. No. 1) did not relate to defendant's express promise to pay him 5%, but rather was directed toward compensation which plaintiff might receive for interim services. (See, Pl. Ex. No. 78; compare Def. Ex. No. 1 with Pl. Ex. No. 70) For plaintiff to ignore financial consideration in connection with the unique services which he rendered would have been foolish in light of plaintiff's large family, his declining personal wealth and the time, effort and expense he devoted to defendant's cause. In all of plaintiff's earlier arrangements with would-be American corporate purchasers, plaintiff always took steps to insure that he would be compensated for his efforts. In fact, testimony was presented to show that on one occasion plaintiff would have been entitled to receive $175,000.00 cash plus an option to buy ten percent (10%) of the stock acquired by the successful purchaser, with financing guaranteed, had the acquisition been completed. (Tr. 63, 477-78, 881; Pl. Ex. No. 6)

5. The Court's determination that plaintiff's claim in quantum meruit must fall because of a failure to prove damages is improper. There was ample evidence presented at trial to demonstrate the value of the trusteeship to Inter-

handel. The dramatic increase in the value of Interhandel's shares on the Zurich bourse, added some 55 to 60 million dollars to the net worth of Interhandel. It was enriched by this amount as a direct and immediate result of plaintiff's effort. Plaintiff was entitled to a proportionate share of such enrichment. The fact that the trustee had authority to expend Thirty Million Dollars ($30,000,000.00), if necessary, to satisfy claimants in this controversy, (Tr. 228, 892) is indicative of the value which Interhandel itself placed upon the trusteeship. This was a measure of the value that the defendant itself placed on these services. These measures are, however, sufficient to enable the Court to determine a just and reasonable amount for the value of plaintiff's services.

6. The Court has attempted to follow the wellknown rule that speculative damages may not be awarded. The trier of the facts is not authorized or required to determine damages where the damages are uncertain, but this principle of speculation with regard to damages is not applicable to the amount, but only to the existence of damages at all. Here services were proved as recognized by the Court in its opinion, but the Court has said there was not proof of the value of the services. As the Supreme Court said in *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555-568 (1931), the uncertainty as to the amount of damages will not defeat a claim on the theory of speculation. Where damages have been established, it is for the trier of the facts to fix the fair amount of such damages, in this case the fair value of the services based on the benefits conferred by plaintiff's activities to the defendant.

7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him.

WHEREFORE, the premises considered, plaintiff moves this Court to reconsider the decision heretofore reached in the instant case or, alternatively, to open the Judgment and take additional testimony.

Exhibit "A", May 19, 1964

WASHINGTON MERRY-GO-ROUND

DREW PEARSON

Washington.

Two heart-sickening legal proceedings which have some bearing on each other are taking place in opposite parts of the world today. One is in Frankfurt, Germany, where the Nazi killers of Auschwitz are on trial; the other in Washington, D. C., where the war-seized property of I. G. Farben is being disposed of.

In Frankfurt, gruesome testimony tells of special rations of liquor and cigarets for Nazis who performed extra work in killing Jewish prisoners. A Polish doctor who served as a clerk at Auschwitz told of keeping the records of 130,000 male inmates killed.

In Washington, in the other court proceeding, Attorney General Kennedy has authorized the sale of General Aniline and Film, the very valuable property once owned by I. G. Farben, back, in part, to the Swiss company which served as the dummy for I. G. Farben.

It was, of course, I. G. Farben which used the Auschwitz slave labor.

Despite this, and despite the fact that every other U. S. Attorney General has refused to return any of I. G. Farben's property, Bobby Kennedy has now completed a deal whereby $60,000,000 will revert to Interhandel.

The big mystery is—why? Perhaps Sen. Keating (R-N.Y.), a member of the Senate Judiciary Committee with a good record on religious fairness, should investigate.

* * *

Meanwhile, a side court action which sheds some light on the dickering over I. G. Farben's property in the U. S., has been filed in the U. S. District Court in Washington. It's a petition to get a slice of the profit from the sale of General Aniline & Film, filed by Robert A. Schmitz, an American whose uncle, Herman Schmitz, was convicted as a war criminal for building the I. G. Farben plant alongside Auschwitz in order to use Jewish slave labor. Robert Schmitz's father, Detrick (sic), was the head of General Aniline, I. G. Farben's property in the U. S.

He now claims a 5 per cent commission for helping arrange the sale of General Aniline stock and tells an interesting story about the scramble to get hold of this valuable property. Between 1947 and 1958, Schmitz says, he was suucessively authorized to act as agent for Remington Rand, headed by the late Gen. Douglas MacArthur; the Atlas Corporation, headed by financier Floyd Odlum; Shields and Co.; W. R. Grace and Co.; Food Machinery and Chemical, all anxious to obtain this valuable property.

Schmitz also tells how in December, 1958, it was decided to pick an important American to negotiate with the U. S. government—namely Charles E. Wilson, former president of General Electric, who had served as chairman of the War Production Board and was president of Ike's People-to-People Foundation.

• • •

Wilson served without pay, according to Schmitz, because he believed in Interhandel and looked upon the confiscation of I. G. Farben's property as against U. S. interests—also illegal and immoral.

In the summer of 1961, Robert F. Kennedy had become Attorney General and appeared to reverse the policies of all previous Attorneys General that the General Aniline and Film property should not be sold back to any organization having ties with I. G. Farben. Previous Attorneys General had consistently ruled that Interhandel was a cloaking operation for I. G. Farben.

When Bobby Kennedy took over, the help of Charles E. Wilson was no longer considered necessary. Interhandel felt confident that with Kennedy running the Justice Dept. it would be able to obtain the property which other Attorneys General, both Republican and Democratic, had refused to relinquish.

So Wilson was given the hint to bow out. He did so in November, 1962.

Additional Points and Authorities in Support of Plaintiff's Motion for Reconsideration or Alternatively To Open the Judgment and Take Additional Testimony

I

THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED THE EXISTENCE OF A VALID ORAL PROMISE TO COMPENSATE PLAINTIFF AND TO AFFORD HIM AN EXPRESS EQUITABLE LIEN UPON THE PROCEEDS OF THE SETTLEMENT

A. Ample Evidence Was Presented at Trial To Prove Dr. Schaefer's Promise To Compensate Plaintiff and To Give Him an Equitable Lien.

1. The Promise Itself.

Plaintiff testified at trial that on October 26, 1959, Dr. Alfred Schaefer, the chief executive officer of defendant corporation, unequivocably promised that plaintiff would be paid a sum equal to 5% of the avails of the expected settlement of the General Aniline and Film controversy if plaintiff was able to obtain the consent of Charles E. Wilson to serve as defendant corporation's trustee in negotiating with the United States Government for a settlement of the GAF matter. (Tr. 155-56, 397-98, 426, 431-32) Payment was to be made by the trustee out of the fund representing the proceeds of the sale. (Tr. 155-56, 397-98, 431-32) Plaintiff was cross-examined vigorously by defendant's trial counsel, but his version of the October 26, 1959 meeting was not contradicted.

2. The Reasonableness of the Promise.

Under all of the circumstances of the case, the promise of a 5% "commission" was a fair and reasonable compensation for the services which plaintiff was to render.[1] At the time that the promise was made, defendant corporation had very little prospect of a prompt resolution of its suit seeking the return of GAF. In fact, the prospects for ever securing the return of this property were bleak. (Tr. 29, 544, 548, 1295) Defendant corporation with the aid of the Swiss Government previously had attempted various interventions with United States Government officials to try to secure the return of their property but all had been complete failures. (Tr. 15, 16, 1299-B, 1583, 1649; Def. Ex. No. 86; Pl. Ex. No. 105) Since GAF, which represented approximately 90% of Interhandel's total assets, was declining in value (Tr. 902, 981, 1283-84, 1373; Pl. Ex. No. 161) and since a complete reorganization of Interhandel's management had only shortly before taken place, (Tr. 1276, 1278) the Swiss were "exceedingly anxious" to secure the return of their property. (Tr. 1298) Moreover, the Swiss stockholders were becoming increasingly vocal about the delays in the resolution of the GAF controversy. (Tr. 195; Pl. Ex. Nos. 187, 194) In fact, in 1959, the only access the Swiss had to the United States Government and to the former management of GAF was through the plaintiff and his experience and knowledge were unique and invaluable to them.

Plaintiff was a "finder" of the trustee in the most literal sense of the word. It was plaintiff who originally conceived of the idea of the Swiss appointing an American citizen of indisputable integrity and sound judgment to

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[1] In fact, testimony was presented to show that on one occasion plaintiff would have been entitled to receive $175,000.00 cash plus an option to buy ten per cent (10%) of the stock by the successful purchaser, with financing guaranteed, had the acquisition been completed. (Tr. 63, 477-78, 881; Pl. Ex. No. 6)

assume a trusteeship of GAF for the benefit of the Swiss and to undertake negotiations on their behalf with the United States Government. (Tr. 149-54, 648, 1288-89; Pl. Ex. Nos. 22, 23, 25) It was plaintiff too, who put forth the name of Charles E. Wilson and it was plaintiff who had the means whereby he could secure the consent of this distinguished American to serve the Swiss.

> "A 'finder', it has been said, is one who finds, interests, introduces and brings together parties for a deal, even though he has no part in negotiating the terms of the transaction. [citing cases] As compensation for his services, a finder customarily receives a commission or finder's fee, frequently based upon a prior oral agreement with the party for whom he did the finding."

Baldwin v. *Grymes,* 232 Md. 470, 194 A.2d 285, 287 (1963); see also *Ames* v. *Ideal Cement Co.,* 37 Misc. 2d 883, 235 N.Y.S. 2d 622, 625 (1962).

3. Plaintiff's Finder's Agreement Had to be Kept Secret.

Because of the sensitive nature of the proposed Wilson trusteeship, it was agreed by plaintiff and Dr. Schaefer that the entire matter of plaintiff's agreement with defendant corporation must be maintained in strictest confidence. (Pl. Ex. Nos. 22, 23) Consequently, there was no written agreement between the parties setting forth their agreement and it is submitted in matters such as this, a written agreement would have been quite unusual. See *Hardy-Latham* v. *Wellons,* 415 F.2d 674 (4th Cir. 1968); *Baldwin* v. *Grymes, supra.* A prime reason for the secrecy requirement was the fact that news of the effort to establish the trusteeship would activate the stock market and possibly touch off wild speculation. (Tr. 1276, 1402) Rejection of the proposed trusteeship, of course, would drive down the price of Interhandel shares, (See Tr. 150, 156) and make it impossible to secure the services of any other

distinguished Americans to aid their cause. Aside from the speculative nature of the matter, however, the plaintiff and the Swiss both realized that the linking of the name "Schmitz" to the proposed trusteeship could have adverse consequences in view of the connection of Hermann A. Schmitz and Dietrich A. Schmitz to the GAF controversy. The former was the financial head of I.G. Farben, who had been accused after World War II of war crimes, although later found not guilty at Nuremberg, (Tr. 152, 481) and the latter was alleged by the government to be Farben's agent in the United States. The wisdom of maintaining strict secrecy was pointed up several years later when Drew Pearson made sensational charges against plaintiff when he sought to intervene in Civil Action No. 4360-48. See attached Exhibit "A".

4. There Was Corroborative Evidence to Confirm the Promise.

The promise of compensation made to the plaintiff by Dr. Schaefer was corroboroated at trial in several ways. Plaintiff's Exhibit No. 70, a letter written by Dr. Schaefer to the plaintiff under date of August 30, 1960, made reference to defendant's agreement in Zurich and in Paris "to hold at your disposal certain sums as a compensation for the time you spent in this connection". Since there was no evidence of any discussion in Zurich that plaintiff should render any services to the trustee following acceptance of the trust, this letter can only mean that the Swiss agreed to set aside definite sums to compensate plaintiff for his services in obtaining the trusteeship itself. Moreover, Charles E. Wilson testified that at the Paris conference Dr. Schaefer declared that plaintiff would be "well taken care of" for the job that he "had done". (Tr. 895-96, 1021-23)

The existence of the promise to compensate plaintiff for devoting his full time and effort to the Swiss cause for a period of seven months (i.e., between late October,

1959 and late May, 1960), if not for the longer period from December, 1958 through May 23, 1960, during which plaintiff had been pursuing the trusteeship goal for the Swiss, is much more reasonable than the supposition that plaintiff was willing to donate his time and effort to the Swiss cause without remuneration. Ample evidence was presented at trial to show that in all of plaintiff's past dealings with would-be corporate purchasers of GAF, plaintiff always insisted upon first reaching an agreement as to his compensation. Secondly, several references were made during the course of plaintiff's direct and cross-examination to his large family and to his declining personal wealth as he began to devote more and more time and effort to a resolution of the GAF controversy.

5. The Amount of the Commission Was Not Unreasonable.

In its Opinion filed May 7, 1970, the Court states that "it strains credulity to believe that such a large commission was offered [to plaintiff] to do so little". Opinion, p. 12. The Court, of course, had reference to plaintiff's testimony that he had been promised compensation equal to 5% of the avails of the anticipated settlement if he could secure Mr. Wilson's acceptance of the trusteeship. Plaintiff submits that the Court is not considering the case with a proper perspective. The Swiss were greatly impressed with the reputation and ability of Charles E. Wilson (Tr. 155, 701-02, 720, 1288) and they felt that if Mr. Wilson would serve as their trustee he could soon resolve the long drawn out, seemingly interminable struggle to regain GAF. (Tr. 800, 1298) The Swiss were not able by themselves to secure Mr. Wilson's agreement to act as their agent. Plaintiff was the key to unlocking the door to secure Mr. Wilson's services, and all his capacities and reputation. Relying upon plaintiff's familiarity with Mr. Wilson, they accepted at face value plaintiff's statement that Mr. Wilson would not accept compensation for his services if he were to act as trus-

tee. (Tr. 155) It is not surprising then to find that the Swiss offered plaintiff the compensation which ordinarily they would have been willing to pay Charles E. Wilson for working out a settlement. Compared with the evidence that the Swiss were willing to pay $20,000,000 to $30,000,000 out of the settlement proceeds to satisfy all claims against GAF, Interhandel's properties in the United States, (Tr. 228, 892) the offer of a 5% commission is not out of line.

The defendant did not intend to compensate plaintiff for the amount of services which he was to render on their behalf in attempting to secure the consent of Mr. Wilson, but they intended to compensate him for the result which his services obtained. This is a common situation in business where very often a contact, or even knowledge of a business opportunity, can mean success or failure in a particular endeavor. The 5% figure represents the value to Interhandel of securing Mr. Wilson's agreement to serve on their behalf. They were not interested in the time spent or the labor exerted by plaintiff in accomplishing this purpose. An analogy can be drawn between the plaintiff's services in the present case and the services of a real estate broker in arranging for the sale of a valuable property. In cases involving real estate brokers the Courts inevitably will enforce a contract providing the broker with a fixed commission regardless of the amount involved so long as he has tendered performance under his contract. *Palmer* v. *Gleason*, 154 Colo. 145, 389 P.2d 90 (1964); *Nelson* v. *Reinhart*, 47 Nev. 246, 219 Pac. 554 (1923); 12 C.J.S. *Brokers*, § 112 (ed.). In this context it is appropriate to consider the language of the Supreme Court of Wisconsin in a suit by a broker for the recovery of his commission.

> "However, a real estate broker's commission is not based upon the amount of services but on the result of the services. A broker may spend much time and money trying to sell a piece of property, and fail entirely, while again he may succeed in making a sale

> at the expenditure of very little time or money. To hold that Ellis is not entitled to the amount of his claim is to disregard the testimony as to the value of such services." *In re Kayser's Est.*, 190 Wis. 189, 208 N.W. 895, 897 (1926).

Since plaintiff and Dr. Schaefer were dealing with each other at arms length on October 26, 1959, and no evidence has been presented that there was any overreaching on the part of the one or the other at that meeting, the Court should not be concerned about the value which the parties mutually placed upon plaintiff's services.

B. Plaintiff Felt No Need to Make a Record to Confirm His Compensation Agreement Since the Entire Matter Was One of Trust and He Was to Look to the Trustee for Payment.

In the Court's Opinion a great deal of emphasis is placed upon the fact that plaintiff did not immediately seek written or other confirmation of his compensation agreement once the trusteeship had been created. It must be remembered, however, that plaintiff's dealings with the Swiss involved the highest degree of mutual trust and fair dealing. In view of the praise heaped upon plaintiff at the Paris conference by Dr. Schaefer, (Tr. 225, 895-96, 1017, 1027) and in view of the fact that plaintiff was to be compensated for his services by the trustee out of the avails of the settlement, (Tr. 155-56, 397-98, 431-32) neither plaintiff nor defendant considered it necessary to formalize their understanding. (E.g., Pl. Ex. No. 70) Testimony was presented at trial that the trustee had been advised that plaintiff had an agreement with the Swiss whereby they would pay him 5% of the settlement (Tr. 1023) even though the trustee did not then recall when or under what circumstances the money was to be paid. The trustee also testified that at the Paris conference Dr. Schaefer told the plaintiff that he would be "well taken care of" for the job he had done. (Tr. 895-96)

Attached hereto and designated Exhibit "B", is an affidavit executed by Charles E. Wilson subsequent to the trial of this case setting forth his understanding that he was to be responsible for the payment of plaintiff's fee under his powers and trust and that he would have paid plaintiff not less than 5% of the sums that he would have recovered.

II

There Is Ample Evidence in the Record To Justify the Award of Damages to Plaintiff on an Implied Contract or in Quasi-Contract

A. The Court Has Declared That Plaintiff Is Entitled To Reasonable Compensation for His Services.

Plaintiff has established to the Court's satisfaction that he is entitled to be compensated for the services which he has rendered to defendant corporation. Opinion, p. 15. Accordingly, the Court has declared that there has been a breach by Interhandel of a contractual obligation to plaintiff, albeit one implied in law, and that plaintiff is entitled to recover for the resulting damages he has sustained. *Ibid,* pp. 15-16. The Court declined to award damages, however, for the reason that it did not believe that plaintiff has presented evidence of the reasonable value of his services.

B. Plaintiff Did Not Introduce Expert Testimony To Show the Value of His Services Because the Record Contains Many Indicia of Their Value.

The Court has concluded that no evidence as to the reasonable value of plaintiff's services in creating the trusteeship was adduced. Plaintiff respectfully disagrees. From the outset, the Swiss placed a very high value on the benefit they expected to receive from the trusteeship and this value found many expressions.

On the one hand, there are references in the record to the importance that the Swiss placed upon the trusteeship in terms of national honor and pride. The acceptance of the trust by Mr. Wilson was looked upon as a vindication of the Swiss and the righteousness of their case. At Paris, Dr. Schaefer pledged the honor of Switzerland and his own honor that Interhandel was free from enemy control or taint. (Tr. 223, 799, 890-91, 1299, 1299-A) But the best expression of the importance of the trusteeship is contained in the Resolution adopted by the Executive Committee of defendant's board of directors wherein, among other things, it is declared:

> "We submit and truly believe, that, while not only being just and morally right, the return to us of our heretofore vested property-of-record by the United States Government will do much to help clear the way towards an earliest effective implementation of a number of high policies and programs of the United States Government, and will serve the cause of peace, free private enterprise, and enhance the relations and prestige between the United States of America and all free nations of the world, . . ."

Pl. Ex. No. 47, Para. 21.

On the other hand, the record contains several references to the economic value of the trusteeship to the Swiss. At the Paris conference, Dr. Schaefer was so anxious to obtain the services of Charles E. Wilson as trustee that he pledged $20,000,000 to $30,000,000 to satisfy whatever claims might be presented against the settlement fund (Tr. 228, 892) giving the trustee sole discretion to settle these matters. (Tr. 230, 1301) On the Zurich Bourse, the quotations for Interhandel stock rose gradually while the negotiations were under way and steeply when the acceptance of the trusteeship was publicly announced. (Tr. 1480) The acceptance of the proffered trusteeship by Charles E. Wilson caused an increase of over 2,000 Swiss

francs per share on the Zurich exchange, or approximately 450 American dollars per share. (Tr. 1481) This meant, since there were approximately 110,000 shares outstanding, that the value of Charles E. Wilson's acceptance of the trusteeship, as appraised in the stock market, was approximately 55 million dollars. (Tr. 1483) The value of the stock maintained this level during the entire period of the active trusteeship and was still quoted at 4,900 Swiss francs in October, 1961. (Tr. 1484) It was only after the interference of Dr. Schaefer and his offer to accept only half the value of its GAF stock that the quoted value of the stock fell appreciably. (Tr. 1485) As it was, the ultimate amount received by Interhandel for its GAF stock was almost precisely the same as the price of the stock after Charles E. Wilson's acceptance of the powers. (Tr. 1483)

The right to the use of the money represented by Interhandel's share of GAF has a great value, too. Dr. Schaefer no doubt anticipated that Charles E. Wilson would be able, by his influence, to obtain a prompt return of the GAF shares (Tr. 800, 1304; Pl. Ex. No. 160) and thus not only make certain what was otherwise doubtful, but also enable the Swiss to earn many years of interest from the lending of such money. Indeed, if the value of Interhandel's share of the GAF stock is accepted as approximately $120,000,000, the amount ultimately received, the interest on this amount for only a single year would be at least $7,200,000, and probably much more if the high interest rates even then prevailing in Europe are taken into account.

C. Defendant Corporation Should Not Be Permitted To Escape Liability Because of Uncertainty in the Amount of Damages to be Awarded.

A party which has broken its contract will not be permitted to escape liability because of uncertainty in the amount of the damages resulting therefrom. The fact that the full extent of the damages for the breach may be a

matter of speculation is not a ground for refusing all damages.

> "[I]n applying the rule against the recovery of uncertain damages, it is the uncertainty as to their nature, and not as to their measure or extent, that is meant. While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. The manner of measuring the damages having been ascertained, impossibilities in proving same are not required, but only that the best evidence be adduced of which the nature of the case is capable; in other words, the degree of certainty of the proof is dependent upon the character of the proceeding. Why should greater certainty be required as to proof of the amount of damages than in respect to any other part of a case? All that can be expected in any case is that the relevant facts tending to show the extent of the damages be placed before the jury to enable it to make such an intelligent estimate of the same as the circumstances of the case will admit."

City of Kennett v. *Katz Const. Co.*, 273 Mo. 279, 202 S.W. 558, 162, (1918). See also *General Finance Corp.* v. *Dillon*, 172 F.2d 924, 930 (10th Cir., 1949); *Kaiser* v. *Amalgamated Clothing Works*, 169 Va. 574, 194 S.E. 727 (1938); 25 C.J.S. *Damages*, § 28.

The authorities cited by the Court in its Opinion to the effect that damages must be proved with reasonable certainty and specificity for the most part pertain to values of real or personal property sold or exchanged. It is submitted that while the principle cited by the Court is applicable to that type of case, the rule of damages cited therein is ill-suited to the case involving the "sale" or "exchange" of advice and personal services which cannot be precisely valued in terms of dollars and cents. The

Supreme Court recognized this principle in *S.E.C.* v. *Capital Gains Bureau,* 375 U.S. 180 (1963), and that ruling was applied by our Court of Appeals in *Espaillat* v. *Berlitz School of Languages,* 127 U.S. App. D.C. 293, 383 F.2d 220 (1967). In the latter case, the trial court entered judgment n.o.v. for defendant in a suit for breach of contract brought by an instructor against the Berlitz Schools. The trial court rested its conclusion on the stated ground that there was insufficient evidence upon which the jury could ascertain the damages sustained by the plaintiff. In reversing the trial court decision, Judge Danaher declared that a contract suit involving personal services cannot be successfully defended merely because the damages suffered are difficult of ascertainment. The Court then quoted a portion of the Supreme Court's opinion in *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U.S. 555, 563 1931) as follows:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The Court has recognized that the negotiations leading up to, and the creation of, the Wilson trusteeship were unique matters. Under these circumstances it is difficult at best and perhaps impossible for the plaintiff to place a precise monetary value upon his services in accomplishing

the desires of the Swiss. Plaintiff submits that the Court, having already found that he is entitled to damages, should apply a liberal rule with respect to determining the amount of those damages. The language of the Court in *Wenzler & Ward Plumbing & Heating Co.* v. *Sellen,* 53 Wash. 2d 96, 330 P. 2d 1068, 1070 (1958), is noteworthy.

> "Therefore, when it is clearly apparent that the plaintiff has sustained actual damage from the defendant's wrong, a liberal rule is applied with respect to determining the amount of that damage. Moreover, where proof of actual damage to the plaintiff is available, uncertainty as to the exact amount thereof cannot deny to the plaintiff a right to recover any compensation at all". (Quoted with approval from 14 Cal. Jur. 2d 690, § 65.)

D. Interhandel Has Been Unjustly Enriched at Plaintiff's Expense by Receiving the Benefit of His Services Without Adequately Compensating Him.

1. The Measure of Recovery Is the Benefit Received by Interhandel.

On a claim of unjust enrichment the claimant must, of course, not only show that the other party has received a benefit but also that it has been at the expense of the claimant. *Lawrence Warehouse Co.* v. *Twohig,* 224 F. 2d 493 (8th Cir. 1955); *Herrmann* v. *Gleason,* 126 F. 2d 936 (6th Cir. 1942) The evidence presented in this case meets both of the criteria for a recovery on a theory of unjust enrichment. The benefit to the defendant need not be purely and simply a monetary benefit but it more properly can be described as an "advantage". The Supreme Court of Pennsylvania pointed this out in *Mechan* v. *Cheltenham Township,* 410 Pa. 446, 189 A. 2d 593 (1963), wherein it was stated that the measure of recovery under the doctrine of unjust enrichment was not plaintiff's loss, but rather the benefit which defendant had received from plaintiff's serv-

ices. To the same effect is *Lawrence Warehouse Co.* v. *Twohig, supra,* 224 F.2d at 498, and *Herrmann* v. *Gleason,* 126 F. 2d 936 (6th Cir. 1942).

2. Interhandel Was Benefitted Greatly by Plaintiff's Services in Obtaining the Wilson Trusteeship for It.

Plaintiff submits that the idea of creating the Wilson trusteeship and his implementation of that idea with the resolute backing and encouragement of the Swiss, conferred upon the latter a substantial advantage in terms of their dealings with the United States Government, with their own stockholders and with the financial community.

Reference has already been made to the value which the Swiss themselves placed upon the trusteeship, *supra,* page 8. Perhaps the greatest advantage however, was the ability to open negotiations directly with the United States Government, looking toward a resolution of the longstanding GAF controversy, which possessed for the first time a character of trust and confidence. While the Court has declared in its Opinion at pages 7 and 8 that it would be pure speculation to hold that the trustee and his attorney could have negotiated a disposition of the matter at least equal to that which came about as the result of the intervention of Dr. Schaefer, the fact remains that within a very short period of time and while the trusteeship was still in effect, Dr. Schaefer and the Attorney General were able to reach an agreement in principle regarding the settlement of the controversy. (Tr. 1423-25; Pl. Ex. Nos. 202, 204, 206) Since all previous efforts to negotiate with the United States Government in this matter had failed completely and since a new administration completely unfamiliar with the background of this long drawn out litigation had come to power, it is clear beyond a peradventure that the trusteeship enabled the prompt settlement of the litigation.

In evaluating plaintiff's claim for compensation on the basis of unjust enrichment, the Court should consider the following language from Professor Corbin's treatise on Contracts:

> "The availability of the remedy of restitution is not restricted to cases in which the defendant has been guilty of a breach of contract . . . Unjust enrichment, therefore, may be a sufficient reason for granting the quasi-contractual remedy of restitution, even though the granting of that remedy is not restricted to cases of unjust enrichment. If this is true in cases where the defendant has committed no wrongful act, it shall be true, *a fortiori*, if the defendant has been guilty of a breach of contract or other wrong."

5 Corbin *Contracts*, § 1107 (1964 ed.).

That the unjust enrichment theory applies in the District of Columbia is made clear in *Rosenkoff* v. *Finkelstein*, 90 U.S. App. D.C. 263, 195 F.2d 203 (1952) and in *Roebling* v. *Dillon*, 109 U.S. App. D.C. 402, 288 F.2d 386, *cert. denied*, 366 U.S. 918 (1961).

E. The Difficulty in Computing Plaintiff's Damages in This Case Has Been Caused by Defendant's Wrongful Conduct.

The testimony of the plaintiff and of the trustee established that the plaintiff's problems in securing compensation for his services flow from defendant's violation of the trusteeship agreement. Had the trustee been allowed to continue his endeavor to secure a most favorable settlement for the Swiss in accordance with the irrevocable provisions of the powers, plaintiff would have received his compensation from the trustee out of the proceeds of the settlement and the instant suit never would have been filed. The authorities are unanimous that a defendant whose wrongful conduct has rendered difficult the ascertainment of the pre-

cise damages suffered by the plaintiff is not entitled to complain that these damages cannot be measured with the same exactness and precision as would otherwise be possible. See, e.g., *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962); *Stepovich* v. *Kupoff*, 261 F.2d 693 (9th Cir. 1958). The principle finds expression in the following statement by Judge Vann speaking for the Court in *Mooney* v. *Byrne*, 163 N.Y. 86, 57 N.E. 163, 165 (1900):

> "Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit".

Accordingly, it is submitted that the record as it now stands contains the best evidence as to the value of plaintiff's services and the Court should undertake to award the plaintiff such sum as it reasonably believes will compensate him for his exceptional and unusual services.

III

Alternatively, Plaintiff Requests the Court To Reopen the Judgment and To Permit Him To Adduce Certain Additional Testimony Which May Assist the Court in Placing a Value on His Services

While plaintiff believes that there is ample evidence in the trial record to enable the Court to assess the damages to which he is entitled, it may be that the Court will wish to hear certain additional testimony on the question of the value of plaintiff's services. Attached hereto as Exhibit "B" is the affidavit of Charles E. Wilson which would indicate certain additional matters as to which he could testify if afforded the opportunity to do so. Plaintiff expects to obtain expert testimony from the financial community in New York City bearing on this issue. Accordingly, if the

Court is not satisfied with the state of the record on the question of the value of plaintiff's services, plaintiff respectfully requests the Court to reopen the judgment to enable the plaintiff to adduce additional testimony by the trustee and by certain experts in the field of industry and finance.

[Exhibit excerpt from May 19, 1964 "Washington Merry-Go-Round" by Drew Pearson is omitted here. It is printed *supra* at the end of "Plaintiff's Motion for Reconsideration".]

Affidavit of Charles E. Wilson

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss:

Personally appeared CHARLES E. WILSON, of 7 Hampton Road, Town of Scarsdale, WESTCHESTER COUNTY, NEW YORK, before me, who being first duly sworn, deposes and says that:

On May 23, 1960, I accepted all of the duties and imperative mandates to act as sole Trustee under Powers in Trust for SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., also known as INTERHANDEL.

I became Trustee under the Resolutions and Powers conferred upon me by the above INTERHANDEL, made part of one another, as ratified on April 28, 1960, at the office of UNION BANK of SWITZERLAND, ZURICH, SWITZERLAND, and which I accepted and acted upon, and which Resolutions coupled to my Powers expressed the intentions of the parties.

Thereunder, I was required by Interhandel to settle their action against the Attorney General of the United States, and solely to conclude any and all negotiations related to all of the property and business of Interhandel in the United States of America the subject matter of this action,

and to convey their property to American purchasers with clear title.

I was required to discharge all claims and all liens outstanding, and that would include the equitable lien of Robert A. Schmitz of which I had knowledge. With that knowledge, and in order to carry out my mandate also consistent with the added express oral understandings arrived at with Interhandel at Paris, France, on April 30, 1960, the fixation of fees including the fee of Mr. Robert A. Schmitz was in my sole discretion under my Powers in Trust.

Ever since that point in time it has been and remains my firm judgment that the reasonable value of the said services of Mr. Robert A. Schmitz was not less than five percent (5%) of the sums recovered by Interhandel under the settlement, and I would have paid Mr. Schmitz not less than five percent out of the sums recovered as part of my obligation.

Paragraphs 23 and 24 of the Resolutions part of my Powers are expressive of the intentions of Interhandel for me to effectively execute, and Paragraphs 2, 4, 5, and 6 of my specific Powers in Trust confirm by obligation.

Defendant's Memorandum in Opposition to Plaintiff's Motion for Reconsideration or, Alternatively, To Open the Judgment and Take Additional Testimony

This opposition is addressed to plaintiff's "Additional Points and Authorities," since it embraces all that was stated in plaintiff's motion.

The first two sections are but a reiteration of what plaintiff's counsel set forth in their proposed findings and as they argued orally to the Court. Authorities cited are either to the same effect as those earlier presented, or are inapposite to the facts of the case at bar.

These first two sections merely ask the Court to change its mind, and to overrule its carefully-considered opinion based upon the totality of the evidence. This is plainly an unreasonable request, since nothing new is presented.

A motion under Rule 59(a) R.F.Civ.P. must establish, according to Barron & Holtzoff *Federal Practice and Procedure,* (*Wright,* Rules Edition), Vol. 3, § 1303:

> "... manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." (at pp. 356-357).

Plaintiff clearly is not meeting this test.

The third point—that the judgment be opened to permit plaintiff to adduce "certain additional testimony"—is not worthy of judicial consideration since on its face it is not even a serious effort to persuade the Court that evidence exists which the Court found was missing at the trial.

An affidavit by Mr. Charles Wilson is tendered and, in addition, *counsel* states that "[P]laintiff *expects to obtain* expert testimony from the financial community in New York City *bearing* on this issue [value of plaintiff's services]." (Underscoring supplied.)

Referring first to the latter statement, not made under oath but merely included in the "Points and Authorities," this *expectation* by plaintiff does not even take the trouble to tell the Court of what the "expert testimony" will consist. The most that is stated is that it will *bear upon* the value of plaintiff's services. Plaintiff has had about one month in which to develop such evidence—if in fact he could obtain it—and yet he fails to identify a witness or to describe the proposed testimony. Judgments would never be *final* if such representation could be the basis for re-opening a case.

Turning to Mr. Charles Wilson's affidavit, the relevant parts of it are an incredible document in the face of the

case which plaintiff undertook to prove at the trial. The relevant parts to which we refer are twofold, as follows:

(1) That the fixing of the amount of plaintiff's "fees" was in affiant's sole discretion.

(2) That it was affiant's "firm judgment" from April 30, 1960 "that the reasonable value of the *said services* . . . was not less than five percent (5%) of the sums recovered"; and that affiant would have paid plaintiff not less than 5%. (Underscoring supplied.)

Let us turn back to page 7 of the "Additional Points and Authorities" where, near the bottom of the page, the following appears:

> "Testimony was presented at trial that the trustee had been advised that plaintiff had an agreement with the Swiss whereby they would pay him 5% of the settlement (Tr. 1023) *sic* [1223] even though the trustee *did not then* recall where or under what circumstances the money was to be paid." (Underscoring supplied.)

Is the Wilson affidavit offered to support the existence of the newly discovered evidence? Hardly! Plaintiff does not use the term, but suggests that affiant did not recall at the trial that which he now swears to. But the affiant does not swear and could not truthfully swear that he did not recall, at the trial, that which he now states in his affidavit has always been clear in his mind.

We heard not one word at the trial that Mr. Wilson had the "sole discretion" to fix the amount of plaintiff's "fee." All of plaintiff's theories were contrary to such an idea. Moreover, according to the affidavit, it has *always* been affiant's "firm judgment" that the reasonable value of plaintiff's services was 5%. If this was *always* his firm judgment, it is not newly discovered, nor did he testify to that effect at the trial.

We are confronted with a newly "discovered" theory, not evidence!

The Court will also note that the affiant does not define "the said services," nor could he define plaintiff's services at the trial (See Tr. 1219-23). Were the services ones which encompassed October, 1959-May, 1960, or December, 1958-May, 1960, as mentioned on pages 4-5 of the "Additional Points and Authorities"; or for procuring affiant to act as "trustee"; or those rendered during the period June, 1960-December, 1961; or extending into 1962 until affiant resigned? The Court will recall that Mr. Wilson rejected out of hand, on cross-examination, that plaintiff's fee was tied merely to procuring affiant to undertake the "trusteeship," Tr. 1223-4. Thus, Mr. Wilson cannot be treating plaintiff's compensation as a finder's fee.

In the abandoned second count of his complaint, plaintiff fixed the reasonable value of his services up to December, 1961, at $150,000. True, this count was withdrawn, perhaps for tactical reasons, but it was a figure which he perpetuated throughout three successive complaints filed in this Court.

Now, Mr. Wilson swears for the first time that in his "firm judgment," which was formed on April 30, 1960, the reasonable value of plaintiff's "said services" was 5% of $145,000,000, or $7,250,000. We wonder whether Mr. Wilson realizes that for a maximum period extending from December, 1958 to November, 1962—about four years, he is allocating to plaintiff an annual income rate of $1,812,500, while during that same era a $200,000 annual salary for the President of Generl Electric Company would take over 36 years to aggregate $7,250,000.

Harsh words could be used to describe plaintiff's effort to reopen this case. Instead, defendant submits that the effort is frivolous, amounting to trifling not only with this Court, but with a "final judgment."

Judge Keech's remarks in *Rue* v. *Feuz Construction Co.* (1952) 103 F. Supp. 499, are particularly in point in the case at bar. We take the liberty to quote him *in extenso* from page 502, as follows:

> "As to ground 5: The principal contention of counsel for the garnishee is that the reopening of this case is within the discretion of the trial court, that such discretion should be exercised upon a substantial showing that an unjust and incorrect judgment is about to be entered, and that the three affidavits make such a showing.
>
> "There is nothing to indicate that any of the parties whose testimony the garnishee now seeks to present to the court were at the time of the trial in any wise incapable of appearing or beyond the reach of the garnishee. Indeed, the parties from whom additional evidence would be elicited are persons who are and have been readily available to the garnishee.
>
> "There is no contention—as there cannot be—that the additional evidence is newly discovered.
>
> "The garnishee's motion coming at this time and on the state of this record is, in effect, a motion for a new trial on the ground that an attorney who tries his case largely on one theory, without producing evidence then available to meet the other issues raised at the trial, should be permitted, after the court renders judgment against him, to reopen the case in order to put in his defense to those issues which at the trial he deemed unworthy of refutation.
>
> "[2-5] The court concedes that under Rule 59(a) the court has discretion to reopen a case on a motion for new trial for the taking of additional testimony. However, such discretion should be exercised only where the circumstances show justification for departure from the usual procedure. It is the view of this

court that failure of a party to call available witnesses to meet issues raised at the trial, does not constitute justification for reopening a case after determination by the court. Public policy and the court calendar are such as not to permit a party litigant to gamble on reliance on one theory at the trial and, after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet the other issues raised by that record, in an attempt to make for a finding in its favor on the theory adopted by the court.

"As to counsel's argument that the court should exercise its discretion to reopen the case upon a substantial showing that an incorrect and unjust judgment is about to be entered, the affidavits now offered by the garnishee do not make a substantial showing that a different judgment would be rendered if the case were reopened for presentation of the facts contained in them."

The whole attempt here is specious, and should be so treated. Plaintiff's motion should be denied in its entirety.

Argument on Plaintiff's Motion for New Trial, etc.

[1747] Mr. O'Donoghue: May it please the Court, we are here to present oral argument on our Motion for a new trial or reconsideration of your Honor's findings and Order in this case.

Basically, your Honor's opinion is to the effect that you found no evidence of an expressed promise, that although you did find evidence of services performed and a basis for a claim in quaisi-contract (sic) or unjust enrichment, that you found no evidence of the value of those services.

The Court: May I interrupt you for a moment? Did I actually find unjust enrichment?

Mr. O'Donoghue: Well, I don't think you did, but you found a basis for quaisi-contract (sic) which I believe is, or which is sometimes quite usually considered the equivalent of unjust enrichment; and sometimes one term is used and sometimes another. I don't believe—

The Court: I don't have any recollection of having [1748] found the services rendered by Mr. Schmitz—

Mr. O'Donoghue: —quaisi— (sic)

The Court: (Continuing) —had any causal relation with the enrichment of Interhandel. Do I make that clear?

Mr. O'Donoghue: I see what you mean, that his services did not contribute to the result?

The Court: Not the result of

Mr. O'Donoghue: I don't know that your Honor found that they did not.

The Court: I think I did. I think that's a reasonable interpretation of it. I found he rendered a service, but I don't think I found those services contributed in any way to the settlement that was ultimately negotiated.

I'm sorry for interrupting you; it was simply to—

Mr. O'Donoghue: That's quite all right. I appreciate your Honor's doing it so that I can concentrate on what may be—

The Court: I shouldn't interrupt you.

Mr. O'Donoghue: No, that's quite all right. Don't feel any concern at all about that.

Let us call it a "quaisi-contract" (sic) that he performed services, for which it was presumed a promise to compensate him may have been made or presumption of it.

On the matter of the actual agreement for compensation, I won't attempt to reargue that to your Honor. I am [1749] convinced that there was adequate evidence that points to-

wards such an expressed promise. There is language in letters written by Dr. Schaefer to Mr. Schmitz in August of 1960, which as you will remember, is the summer of the first activity of the trusteeship, that promises had been made to him, both in Zurich and in Paris; and therefore, we believe that that is evidence that some promise of compensation was in fact made, which said that certain sums had been set aside for him. And I pointed out in our original argument that that could not possibly have any relation to the $2,000 a month that was begun in October of 1960 relating back only to the first of June of 1960 because the main services were performed before that time.

However, I would like to concentrate, therefore, on the question of whether or not there is any real need to prove the value of services, or the damages in detail, or specifically if there is evidence that there was a basis for recovery of any kind. And I believe your Honor has held that there was a basis for recovery, but that you could not award any amount because there was no evidence of that specific value.

Your Honor has cited a number of cases to this effect, and none, however, from the Federal Reports, none certainly from the District of Columbia and none from the Supreme Court.

[1750] In effect, your Honor has said that there must be specific proof of value of or of the amount of damages, even though damages have in fact been proved.

It seems to me that the case in the Supreme Court of Story Parchment Company versus Patterson Paper Company, which of course was cited in our Memorandum in support of our Motion for New Trial, is clearly to the effect that,

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain results of the wrong, not to those damages which are definitely attributable to the wrong, and only uncertain in respect of their amount."

And then it goes on to quote—this is the Supreme Court:

> "It is sometimes said that speculative damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of."

I won't read it all. Much that follows there is quite pertinent here. And it says that:

[1751] "Where, from the nature of the case, damages could not be measured with certainty by a fixed rule, all the facts and circumstances tending to show the probable amount of such damages should be submitted to the jury to enable them to form 'such reasonable and probable estimate as in the exercise of good sense and sound judgment they shall think would produce adequate compensation.'"

And it says that:

> ". . . We can see no objection in placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

In other words, the Supreme Court says that this matter as to speculation applies as to whether or not any damages exist, but that speculation within limits is clearly permitted as to the amount of the damages.

Now, your Honor has cited in your opinion cases about speculation which are just of that kind initially, that is to

say that cases like a man falling off of a train and being injured, and the Court said, "Well, we can't allow speculation as to whether or not there was negligence. That's not something [1752] that can be speculated on. There must be proof of actual negligence. There is no presumption of it. That is clearly consistent with the idea that if negligence was in fact proved, then damages should be ascertained by the best indicia available."

Now, our Court of Appeals has followed this notion in the case of *Espailit against the Berlitz School of Languages of America, Incorporated,* in 127 US Ap. DC, at 293. That was a case that was tried in the Municipal Court, and then went to the Municipal Court of Appeals. It was based on the theory that the plaintiff was fraudulently induced to accept a job as a translater (sic) at the Berlitz School, when they well knew that the job that they had for her required that she be a United States citizen because it was work with the Army, and that they therefore discharged her when the army said, "We can no longer employ you." And, so, the question then was, "Well, what are the damages?"

There were various theories of the damage, but the Municipal Court of Appeals said the award must have been made on sheer speculation because it was submitted to the jury and the jury awarded her damages, but the trial judge granted a verdict N.O.V. and that was sustained by the Municipal Court of Appeals. But the United States Court of Appeals said that "such treatment is improper in a case of [1753] personal services. It said,

> "It might be appropriate where it involves the sale or exchange of property, real or personal. It is our view, however, that a measurement merely in terms of the value of real or personal property sold or exchanged fails of applicability in the requisite 'flexible manner' when a contract for personal services has been induced by fraud."

It makes no difference that that was induced by fraud here because the Court of Appeals said the only question we are considering is the amount of damages, or whether the damages were speculative or not. So, whether the damages were induced by fraud or whether a breach of contract, is of no significance on this score.

The Court then said that the various items of damages, the various elements that go to make up the question, that go to determine the question can be submitted to the jury for their best consideration, and it spoke about the type of instructions that might be given in the case:

> "The jury will be instructed to ascertain the value of the contract to the appellant. The trial judge will charge that the jury's determination will not necessarily be based upon the amount of the promised salary, but the jurors will be free to consider as some [1754] evidence of that value that the parties themselves had agreed the Appellant was to receive $600. per month. As some measure of what the Appellee deemed the contract to be worth, the jury will consider additionally the value of the Appellant's services. Among other factors susceptible of proof, the jury may take into account the Appellant's qualifications for the undertaking in question and her earning power in various capacities reasonably related to the nature of the services the Appellee intended she should render over the contemplated life of the contract."

Then, it goes on to say:

> "All the other factors that would illuminate this question of what the damages might be . . . ."

that in a case where the measure of damages is a very difficult one—and there it was not difficult as compared with this case—that you cannot except that the usual proof of the value of services or the amount of damages is available, that all the various elements have to then be taken into consideration.

Now, in this case, it seems perfectly clear that the word "unique" is applicable. I don't think we can find any case where services were performed by anyone in identical or even similar circumstances. The services performed by Mr. Schmitz were so unusual as not to be readily fitted into any category to determine their actual value. But, [1755] nevertheless, I believe that we introduced a great deal of evidence such as the Supreme Court or our Court of Appeals would think would be relevant, if not precisely, by statement of someone saying, "The value of the services is such-and-such, that such a result justifies this percentage of compensation, or such-and-such an hourly rate is applicable here." This is not the kind of case that lends itself to that sort of thing.

It is the result that is produced whether it is easy or difficult. It is like, in some respects, like a real estate broker or some other kind of broker: He may, with great ease, produce a result that is extremely valuable to his client, and if so, he is entitled to substantial compensation for that, just as an attorney may make a claim for services, let us say, when he has accomplished a result. It may be after an extended trial and multiple appeals, or it may be that he convinces the defendant without the necessity of even filing suit that his client should be compensated in some substantial way.

Well, under those circumstances, it is the result that counts; and a judge or a jury should, taking all those elements into consideration—the result, the effort expended, and so forth—come up with some figure that compensates that plaintiff, that person performing the services for the services that he has in fact performed.

[1756] The Court: Let me interrupt you: What do you say is the result of the services which were accomplished by Mr. Schmitz?

Mr. O'Donoghue: Well, I say this—of course, perhaps your Honor disagrees with this—that he developed a concept, a theory, an approach to this "ball of wax," "can of

worms'' decision that had gone on unresolved for at least twelve or thirteen years; and he proposed a concept that appealed to the Swiss who were the ones concerned here. They accepted it; they adopted it; they utilized it; they took advantage of it, and I say that it clearly produced the result that Mr. Schaefer did not walk into the Attorney General's Office, off the street, as he would have us believe, and say, ''What will you take by way of settlement of this case,'' and that the fifty percent proposal was then made, without the hard work that was performed by Mr. Schmitz, Mr. Wilson and Mr. Spofford to bring that result about.

Now, I say also that some of the things that he accomplished, simply by getting the services of Mr. Wilson, that that increased the value of the stock of Interhandel by some 55 or 60 million dollars. It immediately jumped up to that and was maintained at approximately that value during the entire period of the trusteeship; and it was also the amount for which the settlement was finally made, with remarkably close per-share value of the stock that the bourse [1757] assessed it at by obtaining the services of Mr. Wilson. And I say, when he has accomplished a result of that kind, that the reasonable thing to do is to compensate him in an appropriate portion of that.

I think it is up to the Court to determine what that appropriate proportion is, considering that if either were an attorney, let us say, who produced a result of that kind, one-third would not be considered unreasonable so why would 5 percent, which is what there is certain evidence that, first if (sic) all, Mr. Schmitz said he was promised. There was the evidence from Dr. Sturzenegger when he was asked, didn't he promise something of that kind, or 2 or 3 percent? He said, ''I don't know. I may have said 2 or 3 percent'' or language of that kind, at least, so that there is evidence of that kind showing that values, appropriate values can be put on it.

Additionally, these are all just, let us say lines which interject somewhere and reach that result, which should be

achieved by the Court, that is to say, the work he did for United States companies with the idea of selling the GAF stock to an American Company. We saw that in one instance, he was promised $175,000 plus 10 percent of the stock that would be financed for him without any cost to himself, which would have been a very large amount, much more than he is asking for here. All of those things go [1758] to show the value, and it is the value to the Swiss that counts. It's what has been delivered to them, just as an attorney accomplishing results for his client, it's not how many hours he spends or anything like that; it is what results he got.

This situation, of course, was different in that he was not trying to work out a deal between an American company and the Swiss owners of the stock; it really went much farther than that. It was some plan and concept which ultimately was successful, that got back for them the stock itself, or half the value of it, and that was the result of their mission by Mr. Wilson and Mr. Spofford that enlightened the United States Government.

And I must say, I saw no basis for your Honor's conclusions that Mr. Wilson found that after the Democrats were elected in November of 1960, that there was no point in pursuing the matter any further with the Republican Administration because his very testimony is, that's when he did pursue it most thoroughly; and the Republican Administration was anxious to reach some conclusion before it left office.

And then, the conclusion that nothing more was done until the next summer when some slight effort was made: The fact of the matter is that during that period, contacts were made with the incoming administration, and that very [1759] brief known as "The Trustee's Memorandum" which if your Honor read it, I'm sure you would find extremely convincing as to the merits of the Swiss position. I am convinced that that, delivered as it was, to the Assistant Attorney General, was largely instrumental in facilitating this ultimate disposition of the case; so I say it was

this concept, these various activities that were performed by Mr. Schmitz, and if they did not in fact ultimately result, it was only by reason of the Swiss' own action, by their violation of the contract that had been so carefully drawn by Mr. Schmitz himself, and entered into by the Swiss, to the effect that the powers to the trustee were irrevocable, their revocation of those—attempted revocation; and I say they were not revoked until rescinded—that it was during that period that those powers were fully in effect that this basic agreement was entered into, and that this was a contract to which Mr. Schmitz was a third-party beneficiary, as it were; that it would give the irrevocable power to Charles Wilson to settle this matter and to settle all claims arising out of this, including those claims of Mr. Schmitz himself.

To repudiate that and to say, then, that Mr. Schmitz has no right to make the claim seems to me, well, reprehensible on the part of the Swiss, and I think it is something—an injustice that should be righted by this Court.

[1760] I don't know that this should be necessary. As I say, I think all the evidence is in there which enables the Court not to speculate, but to consider all factors and reach a reasonable amount that would compensate this man, so that the defendant who breached this contract would not be able to take advantage, as the Supreme Court says, of the difficulties of determining the value of the services; but that should not be something that enures to their benefit but on the contrary, that if it is difficult, the consideration should be against them rather than in their favor, and that the plaintiff should have the advantage, whatever it is, and the difficulties of ascertaining the value of the services, that in molding a result, or, as one of the courts has said, "to use the processes of equity to get a just result," those things should be taken into consideration.

Alternatively, we suggest that if your Honor has not been satisfied of the evidence which I feel your Honor should have been satisfied with, of the value of the services of Mr.

Schmitz, that you permit the case to be reopened pursuant to Rule 59 and evidence offered as to that value.

We are not prepared at the moment to go ahead with such proof, but we have made inquiries which lead us to believe that we could get excellently qualified, expert witnesses who could testify with some difficulty, because [1761] they recognize the uniqueness of these services, and that they don't fit into any of the ordinary categories; that we have been in contact with at least two other qualified experts in addition to Mr. Charles Wilson whom I believe should be permitted to testify as to his view, from his intimate knowledge of the value of the services of Mr. Schmitz.

And if your Honor is not satisfied that you can reach a conclusion as to the value of these services from what is already in evidence—which, in my opinion, should be enough—then, in justice you should permit us to—you should reopen the case to permit us to offer testimony on this point so that you can determine the value of these services under the circumstances. And if, therefore, you are not satisfied with what you have presently available, I ask that you act to reopen for that purpose. Thank you.

The Court: Mr. Wilson.

Mr. Wilson: I don't think I have anything to say in addition to that. We are confident as to the first two points that your Honor came to grips with, with the law as it is. Mr. O'Donoghue has not offered you anything in the way of citations that I think changes the reasoning that your Honor gave.

The interesting thing is that as I listened to him at the concluding argument of the trial, and I listened to him [1762] today, he still doesn't want to suggest a figure to your Honor. He wants to turn you loose with the facts and say to you, to come up with a figure. But an advocate for a plaintiff should at least have suggested a figure which he thinks your Honor would be justified in finding, and he is, for some reason, avoiding that in its entirety.

With respect to the third point of reopening the case, I think we "come to grips" with that. Mr. Wilson's affidavit

is of no value in this situation for the reasons we have pointed out; and the suggestion made at the time the motion was filed that they were looking for other evidence bearing on this point, and updated today with the information today that they still don't know what these witnesses are going to testify to—I think Judge Keech "came to grips" with this in the cases we cited to your Honor and reported to him on, and I would be taking your Honor's time to repeat his rulings. I think it's sound.

In your Honor's discretion, on Point 3, you should, of course, not reopen the case.

On Points 1 and 2, there has been nothing said here which disturbs your viewpoint on the law as you announced it once before.

The Court: Do you want to say anything further, Mr. O'Donoghue?

[1763] Mr. O'Donoghue: Only this, your Honor, that we did suggest in our Proposed Findings various bases and amounts that would be appropriate here. We suggested 5 percent of $340 million or 5 percent of 75 percent of that, or alternatively, 5 percent of $120 million, all of which are based on recovery, or potential recovery, on the part of the Swiss.

We have suggested those figures, and we do say that, if necessary—I mean, yes, if necessary, or if permitted, we will produce witnesses who can testify generally to that effect.

The Court: Let me ask you this question: That all proceeds on the assumption that you feel that the services rendered by Mr. Schmitz—and correct me if I am wrong—services rendered by Mr. Schmitz accomplished this result, the settlement which was ultimately carried out?

Mr. O'Donoghue: I don't think they would necessarily have to do with that, but—

The Court: Don't you, in every instance, use your percentage figure as a percentage of the settlement?

Mr. O'Donoghue: Yes.

The Court: —or of some other settlement which would have been larger than that ultimately accomplished?

Mr. O'Donoghue: That's right.

The Court: Haven't I found Mr. Schmitz did not [1764] accomplish that?

Mr. O'Donoghue: Well, let us suppose, your Honor has done that. You have certainly stated it today.

The Court: I think I did in my Memorandum.

Mr. O'Donoghue: Maybe you did. I can't say—then.

The Court: So, we do have a situation, if I may interrupt you, we do have a situation where for a period of time between the time that Mr. Schmitz went to work on this project and the time Mr. Wilson was appointed, accepted the trusteeship, Mr. Schmitz rendered some services.

Have you offered any evidence as to the value of those services?

Mr. O'Donoghue: No, we have not, because we consider that they were related to the result. But I think, your Honor could arrive at the values of that on the basis of what he was paid by other companies, what he requested to be paid for his interim services, not the amount he was actually paid, which was understood to be more or less for a retainer. We have not presented evidence on that because we believe the whole thing was so intimately tied together as to not to be capable of divorcement. But your Honor knows that he did work in the interest of the Swiss for a long period of time, part of that time without any [1765] compensation at all and part of that time for a very minimum amount of compensation.

The Court: Of course, as to that second part you specially waived. You waived the Second Count of the Complaint which related to that second period of service, did you not?

Mr. O'Donoghue: No, I don't think we did. We just said we didn't put a definite—

The Court: I didn't understand you are proceeding on the Second Count. Am I wrong on that?

Mr. O'Donoghue: We are not proceeding on the Second Count, but we are proceeding on quantum meruit.

The Court: But you were proceeding on this second period starting June 1, 1960?

Mr. O'Donoghue: We are not proceeding on that, but on the actual amount of money that—

The Court: As I remember it, the Second Count made a claim, was it for $150,000?

Mr. O'Donoghue: Yes. Credit for $38,000.

The Court: Credit for what had been paid, but you did not offer any evidence at trial in support of that?

Mr. O'Donoghue: No, your Honor, we didn't because we withdrew that count and proceeded simply—

The Court: That's the point I am trying to make.

Mr. O'Donoghue: We proceeded simply on a *quantum meruit*, but for that period as well.

Order

After the court entered judgment for the defendant pursuant to its Findings of Fact and Conclusions of Law, plaintiff filed a Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony.

After thorough consideration of plaintiff's Points and Authorities, and after oral argument, the court is of the opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial.

Therefore, it is

ORDERED that plaintiff's Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony, be and hereby is, denied.

JUDGE MCGARRAGHY
Judge

June 30, 1970